SMHI LEGAL NOTES
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Beat the Clock

If you watch American crime shows you will have heard of the concept of limitation periods. Although limitation periods with respect to serious crimes are virtually non-existent in Canada, they are very important in civil law.

The reason for limitation periods is to protect those who might be sued. People who have a potential claim must be diligent about pursuing it because it is not fair that potential defendants should forever have a cloud hanging over their heads, especially after witnesses disappear and memory fades.

The Law

In Ontario, limitation periods are governed by the *Limitations Act, 2002*. There is a basic limitation period in Ontario of two years. As always, there are some exceptions. It begins to run on the day on which the potential claim is discovered or ought reasonably to have been discovered.

> To say that a plaintiff must know the precise cause of her injury before the limitation period starts to run, in my view places the bar too high…

The basic principle of discoverability was summarized by the Ontario Court of Appeal in the case of *Lawless* v. *Anderson*.

"Determining whether a person has discovered a claim is a fact-based analysis. The question to be posed is whether the prospective plaintiff knows enough facts on which to base an allegation of negligence against the defendant. If the plaintiff does, then the claim has been "discovered", and the limitation begins to run. In other words, once the potential claimant knows that some damage has occurred and has identified the alleged wrongdoer, then "the cause of action has accrued".

In this issue

*The articles in **SMHI Legal Notes** are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.*

It is possible to suspend the running of the two years if the plaintiff and the defendant agree to have an independent third party resolve the claim or assist them in resolving it, (e.g. mediation or arbitration.) The clock will stop until the date the claim is resolved or until the attempted resolution process is terminated.

To better illustrate how limitation periods operate, as well as their importance, consider this real life example involving Scotia Capital and its former client, Beaton.

The Facts

In November 2006 Beaton decided to transfer his stock holdings, including 98,000 shares of Northwest Airlines, from RBC to Scotia. During the couple of days that it would take to finalize the transfer, Beaton would not have access to his shares. For this reason, he decided to transfer 50,000 shares only, thus allowing him to sell the balance if needed on a moment's notice. Although this decision was conveyed to Scotia several times, it ultimately transferred all 98,000 shares on December 14, 2006. As luck would have it, the share price of Northwestern spiked to an all-time high. However, because of the mistake by Scotia, Beaton was unable to sell those 48,000 shares that he had tried to reserve. He estimated his loss to be $76,000.

Following discussions with both RBC and Scotia, the latter admitted, on December 27, 2006, that it was solely at fault for the botched transfer. Scotia offered Beaton $5,000 in compensation, which he turned down. He continued to complain to Scotia and in February 2007, he threatened legal action.

On April 25, 2007, Beaton submitted a written complaint to the Ombudsman for Banking Services and Investments (OBSI). In September 2007, the parties agreed to refer the dispute to the

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Accomodating an Employee With a Disability

The duty to accommodate persons with disabilities means accommodation must be provided in a manner that most respects the dignity of the person, if to do so does not create undue hardship.

Ontario Human Rights Commission

If you are an employer, it is necessary that you be aware of your duties generally under the *Ontario Human Rights Code*, and in particular with respect to accommodating employees with a disability. What this means, in essence, is that as an employer you are under an obligation to remove barriers that would otherwise prevent a qualified individual who has a disability from performing the essential duties of his/her job.

The Law

The term disability is broadly defined in the Code as follows:

(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

(b) a condition of mental impairment or a developmental disability,

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997; ("handicap")

Although employers are not required to sustain undue hardship to accommodate an employee's disability, a serious attempt to do whatever is necessary, on a case by case basis, must be made. Therefore, an employer must determine the needs, restrictions or limitations of the employee. The employer must then determine the barriers and how to remove those barriers.

The employee also has an important role in the process. The employee must cooperate and act reasonably. He/she must communicate the need for accommodation to the employer, including providing timely and useful information regarding his/her abilities and limitations.

As far as what is meant by undue hardship, the Code sets out only three factors to be taken into account:

- cost,
- outside sources of funding, if any,
- health and safety requirements.

Factors such as business inconvenience, employee morale and collective agreements are **not to be** considered in determining whether there will be undue hardship.

> The accommodation process requires communication and collaboration between the employer and the employee in order to conduct an exhaustive search for positions or tasks that match what the applicant is capable of doing despite his restrictions.

The Human Rights Tribunal of Ontario recently decided a case that touches on all of the above. It provides some timely advice for both employers and employees.

The Facts

John Hodkin had been employed by Supply Chain Management (SCM) for 13 years. SCM is the distribution arm of Wal-Mart Canada. Much of Hodkin's 13 years had been spent working as a 421 Clerk, a mostly technical job that included some physical labour. In November 2009 Hodkin's job duties were changed such that he would now spend very little time at a desk and most of his time operating a reach (similar to a forklift), a much more physically demanding job.

At that time, SCM introduced to Hodkin a work hardening plan designed to ease an employee into a more physically demanding job. Within the first day of performing the new job, Hodkin experienced pain in his knee. A short time later, he was

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diagnosed with osteoarthritis stemming from a 25 year old sports injury.

Hodkin was assigned modified light duties. Following the Christmas holidays, he was to once again begin the work hardening plan. Before this could happen, Hodkin needed emergency surgery on his back. After an almost three month recovery, he returned to work again on light modified duties, which consisted of creating white labels numbered 1 through 31 all day long.

Hodkin's knee continued to be an issue and the orthopaedist indicated that he would have to continue with light duties for the foreseeable future and that he could not and should not resume physical labour.

Toward the end of April 2010, SCM identified a single job that it felt Hodkin might be able to do. To this end, Hodkin was sent, in early May, to Toronto for a two day independent medical evaluation (IME). The purpose was to determine whether Hodkin could perform the duties of this particular job. Unfortunately, after one day of lifting weights and performing squats, the incision from his back surgery opened and he was unable to complete the second day of the assessment. Following his return from Toronto, he continued to make labels. When asked why it did not send him for a follow up IME, SCM's answer was that it was because they did not expect a different result.

Aside from requesting that he go for the IME, at no time did SCM ever discuss with Hodkin ways that his disability could be accommodated. Nor was there any internally coordinated effort to identify tasks that Hodkin could do in order to accommodate his disability.

On June 11, Hodkin was called to meet with HR. He was given a letter of termination stating that because he was unable to complete the IME "it was clear that work in this environment was not physically suitable for you."

Hodkin filed a complaint of discrimination with the Human Rights Tribunal. SCM responded by taking the position that it had attempted to accommodate Hodkin's disability to the point of undue hardship.

The Decision

The adjudicator found that SCM had failed to accommodate Hodkin to the point of undue hardship. The adjudicator made the following findings.

- The focus (of the IME) was entirely on the applicant being able to perform all of the tasks of the new position and not on how this position, or any other, might be modified to meet the legitimate needs of the applicant and the employer.
- There was no dialogue with Hodkin. It did not discuss the purpose of the IME with him nor were there any discussions following his return from Toronto. In fact, the adjudicator stated that SCM's failure to schedule a second IME alone was sufficient to demonstrate this failure to accommodate.
- The accommodation process requires communication and collaboration between the employer and the employee in order to conduct an exhaustive search for positions or tasks that match what the applicant is capable of doing despite his restrictions.

The Award

Hodkin requested and was awarded damages equivalent to one year of his annual salary less the amount that SCM had paid him at the time of his dismissal. He was awarded $10,000 for injury to dignity, feelings and self-respect, which was substantiated by both the objective seriousness of SCM's conduct toward Hodkin as well as the latter's own evidence about the effect that the experience of discrimination had and continued to have on him.

SCM was also directed to retain an expert in human rights to review its human rights policies and to train all of its current employees holding the rank of manager or higher as well as the entire staff in human resources, with respect to the revised human rights policy, the Code, and the duty to accommodate.

The Lessons

This decision makes clear that an employer's obligation to take seriously its duty to accommodate an employee with a disability. It is incumbent upon the employer, once it becomes aware of an employee's disability, to begin a dialogue with that employee. It must discuss with the employee what the employee can do as well as his/her limitations. It must make a serious search within its current structure to try and find a position that the disabled employee can handle. If necessary, consideration must be given to bundling a variety of tasks to "create a position".

As for employees who have a disability, it is up to the employee to make the employer aware of his/her disability and to ensure the employer has a clear understanding of his/her limitations. Employees must be forthcoming and cooperative in the process.

Bottom Line

It is always prudent to seek legal advice prior to terminating an employee's job, it is doubly so in a situation involving an employee with a disability.

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OBSI. At the end of a nine month investigation, the OBSI sided with Scotia.

Although Beaton did begin litigation against Scotia, it was not until November 2011, almost five years after the loss occurred. Beaton was aware that he was beyond the two years however he argued that the clock had not truly started to run until March 2010 when he received detailed transcripts of phone conversations that clearly established the magnitude of Scotia's mistake.

Scotia brought a motion for summary judgment, wherein it requested that Beaton's claim be dismissed since it was filed well beyond the two year limitation period.

Both parties were in agreement that a mistake had been made and that it had been made by Scotia. Therefore, the only issue to be decided by the Court was when Beaton's claim was discovered in order to determine when the limitation period began to run and, more importantly, when it expired.

The Decision

Mr. Justice Belobaba, who heard the motion, agreed with Scotia. He dismissed Beaton's claim, concluding that Beaton became aware that he had a possible case at least by the end of April 25, 2007 and therefore was well beyond the two year limitation period.

Beaton knew on December 14, 2006, that he had sustained a loss. By December 27, 2006, he new that Scotia had acknowledged its mistake. Certainly by April 25, 2007, when he submitted his complaint to the OBSI, he knew he had sustained a loss that had been caused by Scotia. He also recognized that litigation was a viable option, since he had threatened as much in February 2007.

The clock was paused in September 2007 when the parties agreed to let the OBSI review the situation. However, it restarted nine months later once the OBSI's decision was rendered.

With respect to the disclosures made in March 2010, Justice Belobaba concluded that there was nothing "new" in the material since Beaton's position from the outset was that Scotia was at fault for his losses. At best, this was additional information that simply provided support for Beaton's position.

The Lessons

What lessons and advice can be gleaned from Mr. Beaton's predicament? First and foremost, it is crucial to remember that the general rule is that a lawsuit must be commenced not later than two years from the date the claim arises/is discovered. While there are exceptions to this general rule, they are of very limited application. Two years goes by surprisingly quickly, therefore it is imperative that you seek professional legal advice as soon as possible if you think you have a claim.

Bottom Line

Once the limitation period has run out, the claim is lost forever.

Lite Summer Legal Flick

Summer is a great time for movies, especially when the mercury is soaring. If you have not seen *My Cousin Vinny*, then this is the perfect summer fare. Even if you have seen it, it's worth a second viewing.

My Cousin Vinny stars Joe Pesci as a brash Brooklyn lawyer who finally passes the bar exam on his sixth try. In his first case, he represents his cousin and a friend who are arrested for capital murder after a short stop at a convenience store in rural Alabama. The movie which also stars Marisa Tomei (she won an Oscar for this role) provides a whole lot of laughs.

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