

[2] On June 14, 2019, the Appellant served an amended claim on the Respondent. The amended claim names CIE as a defendant. The Respondents brought a motion to dismiss the amended claim as against CIE, alleging that CIE was added to the action after the expiration of the relevant limitation period.

[3] The Respondents' motion was heard on August 23, 2017. On that day, Deputy Judge Di Gregorio ("Deputy Judge") granted the Respondent's motion to dismiss the claim as against CIE, finding that the 2 year limitation period began on March 24, 2017.

[4] Pursuant to s. 31 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the Appellant appeals the Deputy Judge's final order dismissing the claim against CIE. For the reasons that follow, I dismiss the appeal.

B. Background

(i) *The pleadings*

[5] The Appellant commenced an action in Small Claims Court on March 15, 2019 (the "Original Claim"). The Original Claim named David and Aileen Murphy as defendants. In the Original Claim, the Appellant alleges, amongst other things, that he was wrongfully terminated and that he is entitled to severance and damages for harassment, "intrusive surveillance without consent," and "breach of privacy".

[6] David and Aileen Murphy filed a statement of defence denying the allegations contained in the Original Claim. In their statement of defence, David and Aileen plead, amongst other things, that:

- (a) CIE employed the defendant from September 2007 to March 2017;
- (b) They are the owners and operators of CIE;
- (c) They did not personally employ the Appellant;
- (d) The Appellant has no cause of against them for any claims relating to his employment under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "ESA") and the common law;
- (e) In or around February 2017, the Appellant began failing to attend at work when scheduled;
- (f) On March 3, 2017, the Appellant sought vacation time from CIE and his request was denied. Despite being denied, the Appellant failed to attend work;
- (g) On March 21, 2017, the Appellant requested 12 additional vacation days over 5 weeks. This request was denied;

- (h) On March 23, 2017, CIE learned that the Appellant had been working at another job at times when he was supposed to be reporting for work at CIE. The Appellant requested time off from CIE so he could work at his second job; and
- (i) CIE terminated the Appellant, with cause, on March 24, 2017.

[7] On April 29, 2019, counsel at the Durham Access to Justice Hub, acting on a limited retainer for the Appellant, wrote Respondents' counsel seeking consent to amend the claim to include CIE as a defendant. The Respondents refused to consent because the limitation period against CIE had expired. Subsequently, the Appellant terminated the limited retainer with Durham Access to Justice Hub.

[8] On June 14, 2019, the Appellant served a Fresh as Amended Claim ("Amended Claim"). The Amended Claim names CIE as a defendant and claims the following:

- (a) damages for wrongful termination in the amount of \$25,000.00;
- (b) damages for failing to make CPP and EI contributions during the notice period;
- (c) damages for failing to continue the Appellant's medical benefits during the notice period;
- (d) damages for intrusion upon seclusion; and
- (e) damages for unpaid overtime.

[9] The Amended Claim pleads the following material facts:

- (a) that David and Aileen improperly withheld approval of the Appellant's vacation requests;
- (b) that the Appellant was subject to reprisals for asserting his right to vacation;
- (c) that Aileen improperly searched the Appellant's jacket on March 2, 2017;
- (d) that in March 2019, the Appellant's vehicle was followed by someone, presumably a person related or employed by the Respondents; and
- (e) that on March 21, 2017, the Town of Ajax inspected the Appellant's unfinished basement because of a complaint made by a third party. The Appellant appears to allege that David and Aileen were the complainants.

(ii) The motion to strike

[10] Pursuant to r. 12.02(1)(a) of the *Rules of the Small Claims Court*, O. Reg. 258/98 (the "*Small Claims Court Rules*"), the Respondents brought a motion to dismiss the Amended Claim as against CIE on the basis that the Appellant added CIE after the expiration of the limitation

period. The Respondents also sought to dismiss the claim against David and Aileen on the basis that they were both officers and directors of CIE and the Amended Claim does not allege that either acted outside the scope of their respective authority.

[11] The Respondents' motion to dismiss was heard on August 23, 2019. In an oral decision released the same day, the Deputy Judge granted the Respondents' motion as against CIE and dismissed the motion in relation to David and Aileen.¹ With respect to CIE, the Deputy Judge found as follows:

My conclusion is as follows. It appears to me that as of September the - or sorry, March the 24th of 2017, when the plaintiff was terminated, that in a sense crystallized the commencement of the limitation period. It appears that his claim against the personal defendants, which I understand was issued on March the 15th, 2019, was issued within the limitation period and that's a valid claim. However, on June 14th 2019, which is about two and a half months, more or less, after the expiry of the limitation period, he amended his claim by adding the corporate defendant, which I'll call CIE. I am of the view that pursuant to s. 21(1) of the *Limitation Act* there is an absolute and very clear prohibition against adding a person by way of amendment to a claim after that claim has expired against that person. And I take person generally. In law, a person means person or corporate entity. So, I am of the view that, pursuant to s. 21(1) of the *Limitation Act* the corporate defendant was added outside of the limitation period and therefore, insofar as that defendant is concerned, the claim will be dismissed.

(iii) The Appellant's motion to adduce fresh evidence

[12] On April 23, 2025, the parties attended a case management conference with Charney J. to address the Appellant's request to file fresh evidence on the appeal. On May 5, 2025, Charney J. permitted the Appellant to bring a motion for leave to adduce fresh evidence which would be heard along with the appeal.

[13] The Appellant filed a motion for leave to introduce fresh evidence on May 7, 2025. In his notice of motion, the Appellant sought leave to file a Supplementary Appeal Book and Compendium and a Supplementary Brief of Authorities. In the alternative, the Appellant sought an adjournment of the hearing of the appeal to allow, "ample time for the new and fresh information to be added to the appeal".

[14] The Supplementary Appeal Book and Compendium includes, amongst other things: (a) Deputy Judge Morrison's order setting aside an administrative dismissal of the Appellant's action; (b) the Appellant's Amended Fresh as Amended Claim dated April 14, 2025 ("Fresh as Amended Claim"); (c) a number of emails exchanged with counsel and the court; and (d) a number of documents relating to Access to Information requests.

¹ The transcript from the hearing indicates that the decision was made by "Brown J." During oral arguments, the parties confirmed that this was an error and that the decision was indeed delivered by Deputy Judge Di Gregorio.

[15] The appeal and the motion to adduce fresh evidence was before me on May 15, 2025. At the outset of the hearing, I asked Respondents' counsel whether she required an adjournment to respond to the motion, to which she answered in the affirmative. Despite the Appellant's requested alternative relief, the Appellant advised that he was content with abandoning the motion and proceed with the appeal. I advised the Appellant on more than one occasion that he did not need to abandon the motion and that a short adjournment would provide the Respondents with sufficient time to respond. I also repeatedly advised the Appellant that he was entitled to bring the motion. Despite my assurance that the appeal could be rescheduled in a timely fashion, the Appellant abandoned his motion.

C. Analysis and findings

(i) Standard of review

[16] Rule 12.02(1) of the *Small Claims Court Rules* is situated somewhere between a motion to strike and a motion for summary judgment under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. A Rule 12.02(1) motion is "...brought in the spirit of the summary nature of Small Claims Court proceedings and involves an analysis of whether a reasonable cause of action has been disclosed or whether the proceeding should be ended at an early stage because its continuation would be 'inflammatory,' a 'waste of time' or a 'nuisance' (see *Van de Vrande v. Butkowsky*, 2010 ONCA 230, 99 O.R. (3d) 641, at paras. 19-21)

[17] Owing to the unique nature of a r. 12.01(1) motion and the summary nature of Small Claims Court proceedings, an appeal from a deputy judge's decision on a r. 12.02(1) motion is afforded deference. An appellate court should intervene only if the motion judge misdirected themselves, came to a decision that was so clearly wrong as to be an injustice, or gave no or insufficient weight to relevant considerations (see *Dosen v. Meloche Monnex Financial Services Inc. (Security National Insurance Company)*, 2021 ONCA 141, at para. 38)

[18] If an appeal is based upon an error of law, the standard of review is correctness. If an appeal is based on an error of fact, the standard of review is a palpable and overriding error. Further, if there is an alleged error of mixed fact and law, the standard of review is palpable and overriding error (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 36).

(ii) Governing principles

[19] Pursuant to s. 21(1) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (the "*Limitations Act*"), a person cannot be added to an existing proceeding if the two-year limitation period in respect of a claim against the person has expired. As a result, the clear expiration of a limitation period is an absolute bar to the addition of a party to an existing action (see *Arcari v. Dawson*, 2016 ONCA 715, 134 O.R. (3d) 36 at para. 7, leave to appeal refused, [2016] S.C.C.A. No. 522). Section 21(1) does not prevent the correction of a misnaming or misdescription of a party (see s. 21(2)).

[20] Unlike the *Rules of Civil Procedure*, the *Small Claims Court Rules* do not require a plaintiff to bring a motion to add a defendant as a party to the action (see r. 5.04(2) of the *Rules of Civil Procedure*). Rather, r. 12.01 of the *Small Claims Court Rules* permits a plaintiff to amend their

claim, by right, by filing the amended claim at least 30 days before the trial date (see rr. 12.01(1)-(3)).

[21] The procedural ability of a plaintiff to add a defendant to a claim at least 30 days before the trial date under the *Small Claims Court Rules* does not supersede the prohibition under s. 21(1) of the *Limitations Act*. Where a party is added as a defendant following the commencement of a Small Claims Court action, then the added party may move to have the claim dismissed as against them, pursuant to r. 12.02(1)(a), based on a clear expiration of a limitation period.

[22] The claim against CIE is subject to the two-year limitation period in s. 4 of the *Limitations Act*. The limitation period runs from the date the claim is discovered. Section 5 of the *Limitations Act* sets out when a claim is discovered. Given its importance to this appeal, I have reproduced s. 5 of the *Limitations Act* below:

5(1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[23] Pursuant to s. 5, the date of discovery is the earlier of the two dates under subsections 5(1)(a) and (b). If either of these dates is more than two years before the claim was issued, the claim is statute-barred (*Fennell v. Deol*, 2016 ONCA 249 at para. 20).

[24] Section 5(1)(a) is focused on when the plaintiff had actual knowledge of the material facts underlying the claim (i.e., knowledge of the matters referred to in s. 5(1)(a)(i) to (iv)). Unless the contrary is proved, the plaintiff is presumed to have known of the matters in s. 5(1)(a)(i) through (iv) on the date of the events giving rise to the claim (*Fennell* at para. 21). While a plaintiff's due diligence is relevant to the finding under 5(1)(b), the absence of due diligence is not a separate basis for dismissing a claim as statute-barred (*Fennell* at paras. 18 and 24; *Galota v. Festival Hall Developments Ltd.*, 2016 ONCA 585, 133 O.R. (3d) 35 at para. 23).

[25] Reasonable discoverability of a claim under s. 5(1)(b) that precludes adding a party contrary to s. 21(1) requires an evidentiary foundation. The court must be satisfied that a reasonable person in the plaintiff's circumstances ought to have discovered the claim, and the date of such reasonable discovery must be determined. It is not sufficient for the court to say that the claim was discoverable "before the expiry of the limitation period," without explaining why (see *Morrison v. Barzo*, 2018 ONCA 979, 144 O.R. (3d) 600 at para. 30; *AssessNet Inc. v. Taylor Leibow Inc.*, 2023 ONCA 577, 168 O.R. (3d) 276 at para. 35).

[26] It may be that the date of reasonable discoverability can only be determined at a later stage in the proceedings and on a complete record. In such a case, the motion to add the defendant should be granted, with leave for the defendant to plead a limitation defence: *Morrison*, at para. 30. In the context of the *Small Claims Rules*, this translates into dismissing a motion under r. 12.02(1)(a) and permitting the defendant to plead a limitation defence.

[27] A defendant may rely on the presumption in s. 5(2) that the claim was discovered on the day the act or omission on which the claim is based took place. To rebut the presumption in s. 5(2), the plaintiff is only required to prove that its discovery of the claim within the meaning of s. 5(1)(a) was not on the date of the events giving rise to the claim (*Fennell* at para. 26; *Morrison*, at para. 31). The plaintiff must offer a "reasonable explanation on proper evidence" as to why the claim could not have been discovered through the exercise of reasonable diligence. The evidentiary threshold here is low, and the plaintiff's explanation should be given a "generous reading" and considered in the context of the claim (*Morrison*, at paras. 31-32).

[28] Once rebutted, the burden remains on the defendant to prove that the plaintiff knew or ought reasonably to have known the elements of s. 5(1)(a) more than two years preceding the commencement of the motion to add the defendant (*AssessNet Inc.*, at para. 35) or in the case of a Small Claims Court action, the date on which the amended claim is filed with the Small Claims Court.

(iii) Application of governing principles

[29] The Appellant's grounds of appeal are detailed in his Notice of Appeal, Amended Notice of Appeal, Amended Supplementary Notice of Appeal, and his factum. In those documents, the Appellant alleges that the Deputy Judge made five errors:

- (a) The Deputy Judge failed to consider the practice of the Ministry of Labour to extend time limits under the *ESA*;
- (b) The Deputy Judge failed to consider that the Original Claim, filed on March 15, 2019, asserts that the Appellant reserves the right to amend the claim;
- (c) The Deputy Judge failed to consider rr. 5.03(4) and 26.02(e) of the *Rules of Civil Procedure*;
- (d) The Deputy Judge failed to consider s. 39 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the "*Employment Insurance Act*"). With respect to this alleged error, the Appellant argues that the Respondents falsely told Service Canada that the Appellant was taking

vacation without having vacation time to use. This alleged “falsehood” was detailed in a Supplementary Record of Claim prepared by Service Canada which was provided to the Appellant sometime after September 2018. The Appellant alleges that the Respondents’ statements to Service Canada were false and that the Respondents are in contravention of s. 39(1) of the *Employment Insurance Act*; and

(e) The Deputy Judge failed to consider decisions relied upon by the Appellant.

[30] The alleged errors are without merit. The first four can be summarily rejected.

[31] First, even if the Ministry of Labour has a practice of extending the time limits under the *ESA*, that practice is irrelevant to whether s. 21(1) of the *Limitations Act* prohibits the Appellant from adding CIE as a defendant in the action.

[32] Second, the Appellant’s reservation of his right to amend the Original Claim does not “freeze” the limitation period. Section 21(1) of the *Limitations Act* is clear: a party cannot be added to an existing claim if the relevant limitation period has expired. A party’s pleading cannot override the legislation.

[33] Third, the Deputy Judge was not required to consider rr. 5.03(4) and 26.02(e) of the *Rules of Civil Procedure*. Neither rule is directly applicable as the action is governed by the *Small Claims Court Rules*.

[34] In dismissing this ground of appeal, I recognize that r. 1.03.1 of the *Small Claims Court Rules* states that where the rules do not cover a matter adequately, the practice shall be decided by, amongst other things, reference to the *Rules of Civil Procedure*. In this case, there is no gap in the *Small Claims Court Rules*. Those rules set out the process for amending a claim and for a motion to dismiss the claim. As such, resort to the *Rules of Civil Procedure* is not necessary. The central issue before the Deputy Judge was when the claim against CIE was discovered. The relevant legislation and law on this issue were reviewed with the Deputy Judge during the motion and were applied.

[35] With respect to the fourth alleged error, s. 39 of the *Employment Insurance Act* permits the Canada Employment Insurance Commission to impose a penalty on the employer for making a false representation. Section 39 does not create a cause of action in favour of the Appellant. The fact that the Appellant did not discover the allegedly false statement until sometime in 2018, does not assist the Appellant in establishing that he discovered his claim against CIE sometime after March 24, 2017.

[36] With respect to the fifth alleged error, it is true that the Deputy Judge did not address the four cases cited by the Appellant in his factum on this appeal. On the record before me, it is not clear that these cases were brought to the Deputy Judge’s attention. None of the decisions, which are from courts outside of Ontario, interpret ss. 5 and 21 of the *Limitations Act*. None of the decisions are binding on Ontario courts. Regardless, and as I explain below, the cases do not assist the Appellant.

[37] In *Diversified Metal v. Trivett*, 2014 PESC 25, Cheverie J. granted the defendant's motion to add another defendant to the action on the basis that adding the party caused no prejudice. In that case, the added party was not adverse to the defendant moving party, there was no claim being made against the added party and the added party was made a defendant solely for the purpose of calculating damages. The facts before Cheverie J. are not at all analogous to the facts of this case.

[38] More importantly, prejudice is not a factor in determining whether s. 21(1) of the *Limitations Act* prohibits the Appellant from adding CIE as a defendant to the action. Put simply, prejudice does not play a role in determining when a claim was discovered. Under the previous version of the *Limitations Act* (see *Limitations Act*, R.S.O. 1990, c. L.15), prejudice was relevant to determining whether the special circumstances doctrine applied such that the court could exercise its discretion to extend the limitation period. The special circumstances doctrine was ousted by the *Limitations Act* (see *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469).

[39] In *MacWilliams v. Bank of Nova Scotia and Walker*, 1995 CanLII 3451 (PE SCTD) (PEISC-TD) a third party was added as a defendant to an existing action; however, the third-party did not resist being added as a defendant on the basis that a limitation period had expired. As such, it is of no assistance.

[40] *Mercier v. Summerside Police*, 2010 PESC 1 (CanLII) involved the substitution of a party. In this case, the Appellant does not seek to substitute CIE as a defendant. Again, this decision does not assist the Appellant. I will have more to say about substitution later in these reasons.

[41] *Continental Insurance Co. v. Lehman Manufacturing (Canada) Ltd. et al.*, 1991 CanLII 2749 (PE SCTD) involved the addition of a party to a proceeding. In that case, the motion judge deferred the limitation period issue to trial, rather than addressing the issue on a motion to add a party. If the Deputy Judge found that it was unclear when the limitation period began, then it would have been open to him to dismiss the motion without prejudice to CIE arguing the limitation period issue at trial. That is not what he found. Rather, the Deputy Judge found that the cause of action against CIE should have been discovered on March 24, 2017.

[42] I note that the Deputy Judge's decision does not precisely follow the governing principles I outlined above. That said, when the decision is read in the context of the submissions made to the Deputy Judge and the record that was before him, it is clear that he found that the claims against CIE ought to have been discovered on March 24, 2017. This finding is consistent with the jurisprudence in Ontario that has found that the limitation period for a wrongful termination case begins to run when the employer dismisses an employee without reasonable notice (see *Jones v. Friedman* (2006), 2006 CanLII 580 (ON SC), at para 4; *Badawy v. TD Bank Group*, 2022 ONSC 5445 (CanLII) at para. 33).

[43] The Deputy Judge's finding that the claim against CIE ought to have been discovered on March 24, 2017, is owed deference on this appeal, and was amply supported by the record. For example, the following documents were before the Deputy Judge and establish that, as of March 24, 2017, the Appellant believed that he was wrongfully terminated, and that CIE was his employer:

- (a) the March 24, 2017, termination letter made it clear that the Appellant was terminated with cause and that CIE was the Appellant's employer;
- (b) the Statement of Income and Vacation from January to March 2017 makes it clear that the entity paying the Appellant was CIE;
- (c) The Appellant's employment record and benefit information clearly sets out that his employer is CIE; and
- (d) The Appellant filed a complaint against the Respondents at the Human Rights Tribunal of Ontario. In the materials filed at the Tribunal, the Appellant states that he worked at CIE and includes a full recitation of the Appellant's allegations against the Respondents.

[44] Additionally, in the Appellant's responding affidavit he states that on March 24, 2017, [he] called the Ministry of Labour and complained about harassment at [sic] work place. The Ministry of Labour provide[d] a complaint number to the Plaintiff and told the Plaintiff that they will look at the matter for [CIE] to formulate and put in place a policy on workplace harassment.

[45] In an email to the Ministry of Labour dated March 24, 2017, the Appellant states:

I keep on applying and filing both verbal and written request[s] for my vacation entitlement for 2016. My employer [CIE] with phone number...and with address at...told me on many occasions since March 3, 2017, that I do not have vacation entitlement [this] year....

I come to work around 1:15 p.m. and Aileen Murphy will not let me in. since Aileen Murphy will not let me in AND DO MY WORK I give her written request for vacation leave of absence using my vacation entitlement year and MY REQUEST FOR STATEMENTS OF VACATION RECORDS.

[46] The March 24, 2017, email goes on to state that the Appellant was unlawfully searched, that his personal information was shared with third parties and that he was subjected to surveillance. The March 24, 2017, email is strong evidence that the Appellant knew or ought to have reasonably known that he had a claim against CIE on March 24, 2017. On the other side of the scale, the Appellant led no evidence to rebut the presumption in s. 5(2) of the *Limitations Act* by establishing that he discovered the claim against CIE on a later date.

[47] While not explicitly argued by the Appellant, I have also considered whether adding CIE as a defendant is an issue of misnomer. It is not.

[48] "Misnomer" refers to misnaming. It is a recognition that, in some cases, pleadings can be amended to reflect that the person who is referred to in the statement of claim is actually another person, or that a person identified with a pseudonym, such as a John or Jane Doe, is actually a specific person. See *Dukoff et. al. v. Toronto General Hospital* (1986), 54 O.R. (2d) 58 (H.C.); *Urie v. Peterborough Regional Health Centre et al.*, 2010 ONSC 4226 at para. 99; *Clahar-Herbert*

v. Dan, 2022 ONSC 5720; *Reimer v. Toronto (City)*, 2020 ONSC 1661 at para. 10, affirmed 2023 ONSC 484 (Div. Ct.).

[49] “Misnomers” do not “add” parties to an action. Instead, “misnomer” allows for the insertion of a name into the action as a substitute for a named party (*Urie*, at para. 101; *Reimer*, at para. 9). In a true case of misnomer, the law that governs the addition of a party after the expiry of a limitation period does not apply (see *Stechyshyn v. Domljanovic*, 2015 ONCA 889, 129 O.R. (3d) 236 at para. 19; see also s. 21(2) of the *Act*).

[50] There are several cases where courts have substituted a named defendant for a proposed defendant or changed the name of a misidentified defendant to the intended defendant where it is clear to the proper defendant that the “litigation finger” has been pointed at the unnamed defendant (see *Loy-English v. The Ottawa Hospital*, 2019 ONSC 6075, 149 O.R. (3d) 129 at para. 21(e); *Stechyshyn* at paras. 1 and 19; *Kitcher v. Queensway General Hospital* (1997), 44 O.R. (3d) 589 (C.A.), at paras. 1 and 4; *Lloyd v. Clark*, 2008 ONCA 343, 44 M.P.L.R. (4th) 159, at para. 4; *Ormerod v. Strathroy Middlesex General Hospital*, 2009 ONCA 697, 97 O.R. (3d) 321 paras. 21, 28-29).

[51] The applicable test for “misnomer” is as follows:

1. Is there a coincidence between the plaintiff’s intention to name a party and the intended party’s knowledge that it was the intended defendant; and
2. Are there circumstances that would make such an order unjust.

(see *Lloyd* at para. 4; *Ormerod* at paras. 21, 28-29; *Loy-English* at para. 2; *Clahar-Herbert* at para. 23).

[52] In this case, the Appellant does not seek to substitute David and Aileen for CIE. Rather, the Appellant seeks to add CIE as a defendant alongside David and Aileen. This is not a “misnomer”. This is adding a party after the expiration of the relevant limitation period. As such, s. 21(1) of the *Limitations Act* applies.

[53] Finally, as a matter of completeness, I have considered the Appellant’s claim for unpaid vacation even though this was not before the Deputy Judge.

[54] Neither the Original Claim nor the Amended Claim sought damages for unpaid vacation. The Amended Claim seeks damages for vacation pay that would have accrued if the Appellant was provided reasonable notice. The first time the Appellant pled the unpaid vacation claim was in the Fresh as Amended Claim, served a month before the hearing of the appeal. The Fresh as Amended Claim is included in the Appellant’s motion to adduce fresh evidence.

[55] There are two reasons why the unpaid vacation claim does not assist the Appellant.

[56] First, the Fresh as Amended Claim was served on the Respondents more than 5 years and 7 months after the Deputy Judge dismissed the action against CIE. To the extent that the unpaid vacation claim is made against CIE, it was improperly made. Unless overturned by this Court, the

Deputy Judge's order stands. It was not appropriate for the Appellant to amend the action to include an unpaid vacation claim against CIE when the action was dismissed as against CIE.

[57] Second, the Appellant would have or should have discovered the unpaid vacation pay allegation in March 2017.

[58] A claim for vacation pay is not discoverable simply because vacation pay was not paid when due. Instead, a claim for unpaid vacation is discoverable when the employee knew or ought to have known that he or she was entitled to vacation pay (see *Evangelista v. Number 7 Sales Ltd.*, 2008 ONCA 599; *Brown v. Procom Consultants Group Ltd.*, 2021 ONSC 4185 at para. 15).

[59] The Appellant's March 24, 2017, email to the Ministry of Labour clearly demonstrates that the Appellant believed, at the time of his termination, that he had unused vacation. Additionally, the Statement of Income and Vacation from January to March 2017, demonstrates that the Appellant was paid for 3 days of vacation on March 31, 2017. After receiving the Statement of Income and Vacation, the Appellant would have or should have discovered his claim for alleged unpaid vacation. Again, there is nothing in the record before me that establishes that the Appellant discovered the unpaid vacation claim on a later date.

[60] Based on the record before me, I find that the limitation period for the unpaid vacation claim began to run not later than March 31, 2017. As with the other claims against CIE, the 2-year limitation period had expired by the time the Amended Claim was served in June 2019 or when the unpaid vacation claim was first pled in April, 2025. As such, the unpaid vacation claim does not assist the Appellant in his attempt to add CIE as a defendant to the action.

D. Conclusion and costs

[61] The appeal is dismissed.

[62] The Respondents did not submit a cost outline at the hearing of the appeal. Instead, the Respondents' factum request that costs be awarded in an amount to be spoken to. Such an approach is inconsistent with the *Rules of Civil Procedure* and relevant practice directions.

[63] The Respondents' factum was completed on February 14, 2020, and the appeal was not heard until May 15, 2025. The Respondents had ample opportunity to complete a cost outline and submit it to the court. Deferring costs to be addressed later only delays a conclusion to the appeal and unnecessarily wastes the parties' and the judiciary's time and resources. In some cases, deferring costs is appropriate. This is not such a case. Without the costs outline, I am unable to ascertain the costs amount requested nor am I able to determine whether the costs sought are reasonable and proportionate. As a result, I order no costs.

The Honourable Justice Sunil S. Mathai