Administrative Dismissals: A Decidedly Defence Perspective

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In the past several years, administrative dismissal orders have become a routine existence, if not an annoyance, at various stages of the litigation process. At times for the defence, however, they have also become intertwined with the fabric of a file's overall strategy. Sometimes this has meant waiting out the administrative dismissal which we all know is coming at the two year mark, in the hopes that it may get rid of a "dog file" we have hanging around our office. At other times, it has meant taking a good run on defending a motion that has been brought by plaintiff's counsel to set aside the order in an effort to dispose of a file, force the plaintiff into settling the claim or imposing restrictive terms on the litigation should the claim be revived (such as a timetable or the waiver of pre-judgment interest for some period of time).

As most counsel are now aware, the *Rules* were amended effective January 1, 2015. Under the amendments, the court will no longer be issuing status notices after two years from the date the first defence was filed. An administrative dismissal order would formerly result if the action was not set down (or a timetable was not set extending the time for doing so) within the time period indicated in the status notice. Rather, all actions will now be dismissed five years from the date of issuance of the claim or January 1, 2017, whichever date is later. This essentially means that any claim issued before January 1, 2012, will be dismissed on January 1, 2017, unless a prior order has been made extending the date to set down the action. This will also be done *without notice*. For all claims issued after January 1, 2012, the five year rule will apply and a dismissal order *will be* issued. Part of the impetus behind these changes was dealing with the procedural nightmare they apparently caused, both in terms of court resources spent issuing the notices and dealing with the substantial number of motions brought to set aside these orders.

But what is the net effect of these changes for the defence? The new rule achieves more certainty for defendants as to the ultimate dismissal date (as the time now begins to run when the action is issued and one no longer needs to figure out when the first defence was actually filed to figure out when the status notice ought to be issued). Unfortunately, however, the new rule also shifts the onus from the plaintiff to move the action forward (as they previously had to take steps within two years to avoid having the action dismissed), over to defence counsel who now need to move to dismiss an action for delay, if there has been inaction by a plaintiff within

the five year window. As a result, these amendments have arguably legislated a period of permissible laziness for plaintiffs.

Further, while the threshold on motions to set aside administrative dismissals has always been somewhat low, defendants should be aware that these amendments are making it even more difficult to challenge the setting aside of administrative dismissal orders that have been dismissed under the former rule (yes there are still a bunch of these kicking around). Technically, the test remains the same - that is, on a contextual analysis of the *Reid* factors (i.e. explanation for the delay, inadvertence, moving promptly and prejudice), ought the dismissal order be set aside. However, the courts have now begun to factor into the contextual analysis the amendments, considering whether or not the claim would have been subject to a dismissal under the new rule. This will be a significant, if not overriding consideration in deciding whether to set aside the dismissal order.

This was first articulated late last year in a decision of Master Short (*Elkahouli v. Senathirajah et al.*, 2014 ONSC 6140) even before the amendments took effect. In that decision, despite the fact that the plaintiff had not satisfied the *Reid* factors with respect to setting aside an administrative dismissal order that was made on February 10, 2012, Master Short stated:

[46] This action was commenced on December 16, 2009. If the new rule had applied throughout its existence, the action would be subject to being dismissed on December 16, 2014, being the end of the five year period now contemplated by the new rule.

[47] I appreciate that there are transition provisions with respect to actions commenced under the previous timeframe. Nevertheless an action that would have been subject to dismissal on January 2, 2015 for failure to set the action down for trial under the old rule, now has a further three years before anything happens.

[48] In my view proportionality dictates that this factor be taken into account as part of my contextual approach in determining the appropriate disposition of motions such as the one presently before me.

Recently, Master Short's decision was cited with approval by the Divisional Court in *Klaczkowski v. Blackmont Capital Inc.*, 2015 ONSC 1650. In that case, Justice Wilson set aside an administrative dismissal order and the prior decision of Master Dash dismissing the plaintiff's motion to set it aside. While Justice Wilson also found fault with Master Dash's reasoning with respect to the *Reid* analysis concerning the explanation for delay and prejudice, Justice Wilson also considered the amendment to the rule, stating:

[32] In *Elkhouli*, in assessing whether to set aside a Registrar's order, Master Short considers as a relevant factor the impact of the rule change effective January 1, 2015. At paragraph 39 he explains that the two-year time limit imposed needless costly work upon both Masters and litigants. He confirms (at paragraph 48) that proportionality requires incorporating the rule change into the contextual approach previously discussed.

[33] I agree with this conclusion. The impact of this significant rule change is appropriately considered as part of the contextual analysis weighing the benefits of timely justice against the right to be heard.

While it is not to say that there may now never be a case that warrants the court refusing to set aside an administrative dismissal (especially where there is considerable demonstrable prejudice), defendants ought to be significantly more cautious when deciding whether these types of motions should be opposed. As most counsel are aware, these types of motions have historically resulted in costs being awarded to the defendants even if their challenge was unsuccessful, given that the plaintiff is seeking an indulgence of the court (and this seems to be the way that Master Short awarded costs in *Elkahouli*, costs not being an issue before the Divisional Court), However, there has also been a shift away from this practice in recent time, making defendants more exposed to costs than ever.

There are at least two cases where the court has awarded costs to a plaintiff on a motion where the defence opposed setting aside the administrative dismissal order, but it was nonetheless set aside (see *Avante v. Iny*, 2008 CanLII 41816 (ONSC) and *Municipality of Greenstone v. Marshall Macklin Monaghan Limited*, 2013 ONSC 2030). The commonality between these cases is that it appears that where the court believes that the record is of such a nature that defendants ought to have known there was some risk to them of losing or if the defence's consent had been unreasonably withheld, then the court is prepared to award costs in favour of the successful plaintiff. In light of the amendments to the rule, these cases should therefore give defendants pause to consider whether it is appropriate to maintain opposition to the plaintiff's motion. That said, it is the plaintiff's case to meet to satisfy the court that the administrative dismissal should be set aside. As such, if there is any lingering doubt as to the strength of the plaintiff's position, it is likely within the right of the defendant to require the plaintiff to produce materials which explain the delay and any of the other *Reid* criteria, without attracting potential costs exposure.

This will be an interesting area of the law as it continues to develop over the next few years following the amendments. I suspect that we will see a tightening of the test for dismissal for delay as the defence struggles to regain ground following these amendments. I am also almost certain that we are going to see a fallout as all the claims commenced before January 1, 2012 which are still around come January 1, 2017 get automatically dismissed. Stay tuned!