Employment Law Summary

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# Background Information

**Overview of employment law**

* Parts of it
  + Individual contract of employment (freedom of K) – buying and selling labour
  + Collective bargaining (not part of this course)
  + Legislative intervention
    - Legislative intervention where legislation puts restrictions on ability to K and sets standards on norms that must apply to employment relationships
* Relevant law
  + *Employment Standards Act,* 2000
    - Essentials of what minimums standards employers must meet
  + *Occupational Health and Safety Act*
    - Obligations on all workplace parties with respect to occupational health and safety
      * Is not limited to the corporation – also includes supervisors, etc.
  + *Labour Relations Act*
    - Act that governs collective working relationships in Ontario
  + *Human Rights Code*
    - Prohibits employer from acting based on protected grounds
  + *Workplace Safety and Insurance Act*
    - If injured at work, how to make claim for compensation (even if employer cannot pay you)
  + *Pay Equity Act*
    - Pay people equally for equal work
    - Complex math/algorithm system
    - Very technical
  + *Pension Benefits Act*
    - Employers not required to provide employees with pension but if you choose to give them those things, then you must comply with the Act
  + Common Law
    - Employment law also exists in the common law. Important to look at both law

# Employee vs independent contractor

* **Analysis:**
  + **(1) Is the worker a contractor or employee?** (if employee, end here)
  + **(2) If the worker is a contractor, are they a dependent or independent contractor?**
* **Employees are entitled to employment law protections – independent contractors are not**
* Advantages to an independent contractor relationship
  + IC perspective
    - Can write off expenses
    - Can theoretically deduct taxes
    - “be your own boss”
    - Work for as many companies as you want
    - Have better tax treatment
  + Company perspective
    - No termination, severance
    - Less regulation with CRA and other statutes (ESA)
    - Don’t have to pay
    - General sense that you are not making the same kind of commitment with an independent contractor as an employee
* In determining the working relationship, **the court will examine substance, not form** (*Sagaz*)
  + How parties characterize the relationship is not determinative
* **Types of worker relationships** (descriptions are general characteristics – does not universally apply – e.g. employee does not need to exclusively work for one employer)
  + True employee
    - Exclusive working relationship
    - Individual works for one company only
  + Independent contractor
    - non-exclusive working relationship (supposed to be, but can contract to make it exclusive)
    - It is similar to a contract b/w two businesses
    - Supposed to in theory have equal bargaining power
  + Dependent contractor
    - Middle ground b/w employee and independent contractor
    - That contractor has such a relationship of dependence on one company that they are more akin to an employee
* **Employee vs independent contractor test**
  + **Control test**
    - traditional test
      * Less relevant today because of societal and technological changes
    - Focus is the degree to which control is exercised over the worker by the other party
      * The right to exercise control is at issue here
    - **Five indicia**:
      * (1) worker subject to company policy and discipline? (e.g. hand booklets)
      * (2) does the company decide the method by which the work is performed? (how it should be done)
      * (3) does the company control the worker’s hours? What work is to be done? Which customers that worker can serve?
      * (4) does the company supervise and evaluate worker as he/she is doing his/her work?
      * (5) can the worker do work for others (relationship exclusive?)
  + **Entrepreneur or “four fold” test** (*Montreal*)
    - Focus is whether one party is controlled by the other and whether the worker is economically independent
      * Are these performed on the business’s behalf or on other business that is bringing in worker?
      * Control in and of itself is not determinative
    - **Four factors**:
      * (1) control
      * (2) ownership of tools
      * (3) chance of profit
      * (4) risk of loss
  + **Integration/Organization Test** (*Stevenson*; *Kearney*)
    - One question: is individual’s work done as an integral part of the business or incidental?
  + **Multi-factor Test**: *Sagaz* **(most important!)**
    - Overarching Question: Should this person from a normative perspective be an employee?
    - **“The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account”**
    - there is **no one conclusive test** which can be universally applied to determine whether a person is an employee or an independent contractor
      * the relative weight of the factors depend on the facts and circumstances of the case
    - **Factors to consider:**
      * If exclusive, then highly likely that there is an employment relationship (*McKee*) – very important – part of control technically (see last indicia)
      * the level of **control** the employer has over the worker’s activities **will *always* be a factor**
        + Indicia of control:
        + (1) worker subject to company policy and discipline? (e.g. hand booklets)
        + (2) does the company decide the method by which the work is performed? (how it should be done)
        + (3) does the company control the worker’s hours? What work is to be done? Which customers that worker can serve?
        + (4) does the company supervise and evaluate worker as he/she is doing his/her work?
        + (5) can the worker do work for others (relationship exclusive?)
      * other factors to consider include whether the worker provides his or her own equipment
      * whether the worker hires his or her own helpers
      * the degree of financial risk taken by the worker
      * the degree of responsibility for investment and management held by the worker
      * the worker’s opportunity for profit in the performance of his or her tasks
      * is individual’s work done as an integral part of the business or incidental? (*Stevenson*, *Kearney*)
      * non-exhaustive list of factors!
      * Can look at the intention of the parties (what parties said in the contract, how they described their relationship), but it is not the end-all be all – must look at substance
        + Usually only helpful if principal factors don’t yield a result
    - Practice tip: Always err on the side of someone being an employee b/c there are policy reasons that weigh toward finding a person as an employee
  + *McKee*: woman signs sales + advertising agreement with company; gets $2500 per home they sell. Later given title as senior sales manager and could hire her own sub-agents. She controlled her work and got paid by invoicing the company. But, they told her what lots to sell, when to sell, how to sell, set her hours. There was an exclusivity agreement. Held: employee.
  + *Keenan*: employment relationship terminated; told they would be independent contractors; registered a biz name, registered for worker’s comp, got insurance, used their own truck to transport kitchens, paid in piecework (though when they were employees too), etc. = dependent contractor (not employee)
* **Dependent contractors**
  + Status confirmed in *McKee*
  + Dependent contractor is not entitled to ESA but entitled to common law reasonable notice (*McKee*)
  + Depends on the degree of financial dependency (the determinative factor is exclusivity) (*McKee*)
    - Cannot look at exclusivity as a snapshot in time (*Keenan*)
      * Must look at full history of relationship, not the moment that they were terminated (*Keenan*)
      * *Keenan*: nearly 20 years of service between the two of the workers; even though they worked for a competitor, they still did the majority of work for Canac
    - One must earn substantially more than half of their income from the contracting party (*Thurston*)
      * *Thurston*: lawyer’s billings from client account for 39.9% of her total annual billing = not enough
  + *McKee, Keenan, Thurston*

# Who is an employer?

* Relevant because you **must know who to sue**
  + When employee works in a corporation that has multiple companies, may want to sue multiple companies (some companies may be more or less solvent than others)
* **Common employer doctrine** (common law doctrine) (*Downtown Eatery, King, Jubb*)
  + Employment relationship is more than a matter of form
    - **common employer doctrine allows employee to enforce judgment against consortium of companies which collectively own and operate** the business the worker worked for (*Downtown Eatery*, *King*)
    - As long as there exists a sufficient degree of relationship b/w the different legal entities who compete for role of employer, there is no reason in law/equity that they ought not to all be regarded as one for the purpose of determining liability for obligations owed to the employees
  + Must look at technical corporate structure and look at what’s going on **in substance**
    - Even though employer is entitled to set up corporate structures, **law should not permit complexity of corporate structures to defeat legitimate entitlement of employees** (*Downtown Eatery*)
    - Judgment can also be enforced against successor or merged corporations in corporate reorganization (*Downtown Eatery*)
  + Key question is **where control resides** – which company or companies are asserting control over the employee? (*Downtown Eatery*)
    - Sometimes determined that one company acting as an employer, but other times more than one
  + **FIRST: Test for who is the employer:** (*Downtown Eatery*)
    - Look at 7 factors:
    - (1) Who is the K with? (documents not determinative but are one factor)
    - (2) Who is employee performing services for?
    - (3) Which corporate entity is paying employee?
    - (4) Which entity makes CPP and EI payments and pays taxes on behalf of employee
    - (5) Which entity makes decisions about job assignments and dismissal
    - (6) Which entity employs the employees immediate supervisors?
    - (7) Which entity provides benefits?
  + **SECOND: Test for if there is a common employer?** (*Downtown Eatery*)
    - (1) financial interrelatedness
    - (2) Interrelatedness of services
    - (3) shareholders/directors
    - (4) exchange of directors/officers (do those go back and forth b/w entities)
    - (5) common training
    - (6) common geographic location
    - (7) how the companies represented as relating to each other in corporate documents
      * E.g. payroll, benefits packages, etc.
  + *Downtown Eatery*
    - Employee sued employer for wrongful dismissal after fired from nightclub; owned and operated by a consortium of companies (Landing strip owned IP; downtown eatery leased IP; everyone was paid by another company (beaver), etc.)
    - Sued company he was paid by, Beaver, but it ceased to do business
    - common employer doctrine applies and employee can enforce judgment against consortium of companies which owned and operated the nightclub he worked for
    - held: can sue all companies involved
    - there was a highly integrated group of companies which together operated for your eyes only (strip club) – therefore can sue all corporations working together
  + King
    - 5 different entities owned and operated by the family
      * Corporate entities shared same premises, supplies, telephone system and website. One of the corporate entities 🡪 setting up payroll, employee tax accounts, etc.
      * Multiple corporate entities used same biz name
      * The multiple corporate entities were sufficiently connected and all of them were jointly and severally liable for 24 months notice and pension benefits
    - As long as there exists a sufficient degree of relationship b/w the different legal entities who compete for role of employer, there is no reason in law/equity that they ought not to all be regarded as one for the purpose of determining liability for obligations owed to the employees who in effect have served all without regard for any precise notion for who they were bound in contract
  + Jubb
    - Employer tried to strike pleadings b/c insufficiently pleaded to rely on common employer doctrine
    - Court held that common employer doctrine applied – lots of companies mentioned in Ks, appendix, etc.
    - Furthermore, in the release she signed, it stated that she releases all related companies – worked against employer’s favour
    - Clear that employee was working for more than one company
* **Statutory “Related employer”** (s 4 ESA)
  + Factual analysis and if it’s the case, then group of employers/entities should be treated as one employer
  + And if treated as one employer, then jointly and severally liable for contravention
  + **Statutory provision**
    - **4**(1) Subsection (2) applies if associated or related activities or businesses are or were carried on by or through an employer and one or more other persons
    - (2) The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act.
    - (3) Subsection (2) *applies* *even if the activities or businesses are not carried on at the same time*.
    - (4) Subsection (2) does not apply with respect to a corporation and an individual who is a shareholder of the corporation unless the individual is a member of a partnership and the shares are held for the purposes of the partnership
    - (4.1) Subsection (2) does not apply to the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown
    - (5) Persons who are treated as one employer under this section are jointly and severally liable for any contravention of this Act and the regulations under it and for any wages owing to an employee of any of them.

# Constitutional Jurisdiction

* **Important to know in order to find out which law to apply!!!**
* Both federal and provincial can legislate in the area of labour and employment
* **General Rule**: **Employment regulation in Canada is presumed to be provincially regulated unless the employer in question is federally regulated**
* Provincial constitutional jurisdiction: s 92(13) Constitution Act (property and civil rights)
* Federal constitutional jurisdiction: s 91 right to regulate subjects expressly given to Parliament or expressly exempted form provincial jurisdiction under s 91
  + Generally subjects that are international, national and inter-provincial (things that connect the country)
  + **Including**: banks, aeronautics (including airports, aerodromes, and airlines), marine shipping, ferry and port services, postal services, nuclear, television and radio stations, telecommunications, most federal crown corporations
* Provincial employment legislation: *Employment Standards Act*
* Federal Employment legislation: *Canada Labour Code*
  + Part 3 relates to employment standards
  + Biggest difference: if successful complaint for unjust dismissal then reinstatement of your job (very unique remedy)
* **TEST**: **Is the business / undertaking itself federally regulated?**
  + Jurisdiction of incorporation ***NOT relevant!!*** (*Snider*)
  + Depends on the *nature of the business* (*Snider*)
    - Two situations:
    - (1) employment relates to work relates to a work, undertaking, or biz within the legislative authority of Parliament (“direct federal labour jurisdiction), OR (*Tessier*)
    - (2) when employment in question is “an integral part of a federally regulated undertaking” (“derivative jurisdiction”) (*Tessier*, *Industrial Relations*)
      * federal jurisdiction will extend to activities that are closely connected with an activity that is closely regulated (*Industrial Relations*)
      * if a company’s primary undertaking is within federal jurisdiction and it has an *entirely separate undertaking* that would normally be provincial, that separate undertaking will be provincially regulated unless it’s *integral* to that federal undertaking (*Canadian Pacific Railway*)
        + even if same employee is involved in federally regulated part of business and provincially regulated part of business (*Actton*)
      * Work that is otherwise provincially regulated but is done at site of federal undertaking (e.g. airport) is still provincially regulated (*Montcalm*)
        + What you are doing matters, not where (*Montcalm*)
      * If a small part of your business is engaged in a federally regulated area and in only a short period of time (not ordinary biz), then provincially regulated for entire biz (*Tessier*)
    - For Transportation Specifically: regularly and consistently going out of province? (*Ottawa-Carleton*)
      * Regularly = how often (e.g. everyday)
      * Consistently = how constant (e.g. just one week or every single week?)
  + s 91/92 of the *Constitution Act*, 1867
  + s 2 of the *Canada Labour Code*
    - defines federal work, undertaking or business
      * note: the law can be ultra-vires if it’s not properly defined as constitutionally set out – don’t worry about it though – assume it’s accurate
* **CASES:**
* Snider
  + Employees went on strike; union tried to establish dispute resolution board under *Industrial Disputes Act* (federal); commission (employer) claimed it was ultra vires of federal gov’t
  + Cannot be valid under POGG
  + Federal trade and commerce does not extend to the regulation of a licensing system
  + Not valid under criminal law power – striking not a crime by itself
* Industrial relations
  + Act applies in respect to employees employed in federally legislated int’l navigation and shipping – challenged for constitutionality
  + Everyone agrees that fed gov’t has right to regulate labour relations with respect to navigation and shipping
  + Question is whether it *also applies to office staff* (***support* to shipping business**)
  + Held: federal jurisdiction will extend to activities that are closely connection with an activity that is closely regulated
* CPR
  + Interprovincial railway company federally regulated pursuant to constitution act
  + They *also* ran a **hotel business**
    - Issue was whether hotels that were run by CPR were federally or provincially regulated
  + Hotel biz is separate and independent from railway biz
  + Does not rely on one another
  + Held: Hotels are *provincially regulated*
  + **BLL**: if a company’s primary undertaking is within federal jurisdiction and it has an *entirely separate undertaking* that would normally be provincial, that separate undertaking will not automatically become federal unless it’s integral and vital to that federal undertaking
* Actton
  + main biz: owned and operated interprovincial/international trucking biz (clearly federal)
  + As a side venture: also provided labour in the form of drivers, provided its dispatchers to a related company which provided waste disposal services in BC only
  + Four drivers of waste disposal service filed complaints with BC labour standards for overtime pay (provincial) – and Actton opposed complaints claiming it is federal
  + Held: based on all facts, they are actually separate businesses (not a single federal undertaking notwithstanding that employees provide services to both)
* Tessier
  + Employer’s primary biz was renting out heavy equipment (cranes), and also engaged intraprovincial road transportation and equipment (primarily provincial)
  + But in one particular year cranes were used in federal matter (14% of biz that year) and company sought declaration from gov’t that employees should be federally regulated (b/c so closely connected to shipping)
  + Held: They were fully integrated w/ rest of biz, it was minor part (14% of overall revenue and only for one year), derivative jurisdiction will not apply, *entire operation is provincially regulated*
* Construction Montcalm
  + Question here was: if you do work on *site* of federally regulated undertaking, is all the work done there under federal jurisdiction?
  + Montcalm had K to build runways on land that belonged to Crown w/ fed gov’t
  + Employees of Montcalm complained to Quebec w/ respect to not being paid properly
  + Montcalm told Quebec regulators that they do not have jurisdiction
  + SCC:
    - Rules against Montcalm
    - Even though aeronautics is expressly reserved for fed gov’t, *construction of runway is pretty heavily removed from aeronautics itself*
    - Not a vital part of Montcalm (use integral language b/c more recent)
    - WHAT you are doing is material, not WHERE
* Ottawa-Carleton
  + Reference to transportation – must use *specific test* if something is intra-provincial or interprovincial!!
  + Where transportation companies only operate in one province – provincial, where interprovincial – federal
  + Bus route Ottawa – Hull (Quebec)
    - Distance covered by routes that went into Hull (Quebec) was 0.5% of overall transport; routes carried b/w 10-20k riders everyday and only 4%; income derived from this is only $2M per year
  + Test: **regularly and consistently going out of province?**
  + Held: Not how much they go out of province! bus routes ran on a daily basis; yes.
    - Regular – everyday
    - Consistent – all the time, not temporary
    - Enough to make it federal!

# Ontario Employment Standards Act

* Sets *minimum standards* for employment legislation in Ontario
  + parties are free to negotiate better terms under an employment contract, but **cannot contract out of the minimum** (s 5 *ESA*)
* Provides a complaint procedure (s 96 ESA)
  + Administrated by ministry of labour
  + Regime designed to be an inexpensive and faster way to resolve employment disputes than the courts
* **Parts of the ESA**:
  + Part 5: payment of wages
  + Part 6: record keeping
  + Part 7: hours of work and eating periods
  + Part 8: overtime pay
  + Part 9: minimum wage
  + Part 10: public holidays
  + Part 12: equal pay for equal work provisions
  + Part 13: benefit plans
  + Part 15: termination and severance pay
  + enforcement procedure
* *Danyluk* (case to cite for issue estoppel for *federal* legislation – that is still a concern for it)
  + Under FORMER system (before s 97/98!!) – for ESA
  + Brought complaint under old ESA for unpaid wages including significant commission and complaint was for over $300k
  + Complaint resolved against employee; but procedural unfairness in complaint (couldn’t make submissions, notified of decision later than employer, etc.)
  + Brought a civil action but other party claimed issue estoppel
  + Pre-conditions for issue estoppel were met, but unjust in these circumstances to honour it; TJ committed error of principle
  + Claim was allowed to go forth
  + **pre-conditions for issue estoppel:**
    - (1) that the same question has been decided in earlier proceedings;
    - (2) that the earlier judicial decision was final; and
    - (3) that the parties to that decision or their privies are the same in both the proceedings
* **Limits Re Filing Actions**
  + S 97
    - (1), (2) Once you choose the act (file complaint), you cannot bring a civil action
    - (4) Employee may commence civil action if withdraws complaint within 2 weeks of it being filed
  + S 98
    - (1), (2) Once you bring a civil action, cannot choose the Act
* S 116 appeal as of right to Ontario labour relations board
  + No longer need to apply to director who has discretion not to review case
* **Important Regulations**
  + Ont Reg 285/01 – exemptions, special rules, establishment of minimum wage
  + Ont Reg 288/01 – termination and severance of employment
* **Does ESA Apply? Analysis!**
  + (1) employment relationship? (s 1, s 3)
    - Broad definition of employee in s 1
      * Largely dependent on case law though (b/c it says “includes”)
    - s 3 has certain employees exempted – see #3
  + (2) performing work in Ontario? (s 3)
    - Employment relationship if
      * (a) your work is to be preformed in Ontario **or**
      * (b) work is to be performed in Ontario ***and*** outside of the province but the work outside the province is a *continuation* of the work in Ontario
  + (3) are they listed under one of the s 3 exceptions?
    - See full list in s 3
    - (2) Employees under federal jurisdiction (Canada labour code)
    - (3) diplomatic personnel
    - (5) other exceptions – e.g. some Crown employees, college co-op, holder of political/religious office, director, member of quasi-judicial tribunal, criminal sentenced to do work, etc.
  + (4) are they exempt for a particular part of the Act because they fall into a regulation (Ont Reg 285/01)?
* **Complaint process**
  + Employees who are covered by ESA but **cannot file a claim**:
    - (1) Employees represented by a unions (grievance procedure under collective agreement)
    - (2) Employees who have started a civil action against employer cannot file a claim (s 98 ESA)
  + **Time Limits** (s 116 ESA)
    - Must file complaint within 2 years of the date the wages become due
    - If non-monetary section, e.g. not allowed break to eat, etc. in that case there is a 2 year limit from the date of violation
  + No limit on damages for wages anymore!!
  + ESO for full investigation 🡪 conduct interviews by telephone, questions that need to be answered, can also visit the employer’s premises and can require both parties to attend a decision-making meeting (similar to informal arbitration)
  + **Appealing decisions** (s 116 ESA)
    - Employee has **30 days** to apply for a review from labour relations board
    - Appeal as of right
* **Termination and Severance**
  + when employee is dismissed, employee entitled to notice or pay in lieu of notice and *possible* severance pay
    - termination and severance are different
  + Important: see the **EXCEPTIONS** in Ont Reg 288/01
    - Most important exemptions at **s 2(1)** 🡪 ***most professionals exempt***
  + **Termination**: no termination of employee continuously employed continuously for 3+ months *unless* notice provided or pay in lieu of notice
    - **s 57** outlines notice duration:
      * (a) employment <1 year = 1 week
      * (b) employment 1 year to <3 years = 2 weeks;
      * (c) employment 3 to <4 years = 3 weeks;
      * (d) employment 4 to <5 years = 4 weeks;
      * (e) employment 5 to <6 years = 5 weeks;
      * (f) employment 6 to <7 years = 6 weeks;
      * (g) employment 7 to <8 years = 7 weeks; or
      * (h) employment 8+ years = 8 weeks
    - **S 61**: pay in lieu of notice
      * Must pay wages employee is entitled not later of (a) seven days after employment ends, and (b) day that would have been the employee’s next paycheck (**s 11(5)**)
    - S 60: employer cannot alter employee’s wage rate or any other term of employment; continue to make benefit plan contributions
    - This is **different** from *reasonable notice* at common law – must rebut presumption for it not to apply (which is usually higher – get that in a wrongful dismissal action if there is no clear termination provision)
      * The common law principle of termination only on reasonable notice should be characterized as a presumption, *rebuttable* if the contract of employment clearly specifies some other period of notice (*Machtinger*)
      * **If you do not have termination clause *or* if provision is not enforceable, common law will impose reasonable notice** (*Machtinger*)
        + *Machtinger*: Held invalid termination clause (went below minimum in ESA; even though they actually paid the minimum required under ESA)
  + **Severance pay**: (s 63/64/65)
    - Payment that is seen as an appreciation of someone’s service
    - S 64 Only get severance if you’ve been employed for **5+ years** *AND* (one of the two)
      * (a) the severance occurred because of a permanent discontinuance of all or part of the employer’s business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six-month period as a result ***OR***
      * (b) employer has a **payroll of $2.5M**+
        + *Pacquette*: when determining $2.5M threshold, could look at payroll *all across Canada*, not just Ontario (but there are other decisions that said only Ontario and the ministry website says Ontario; but risk that court will look more broadly based on situation of particular case)
      * 65(2) five year calculation – looks at ***all*** time spent working for employer for purpose of determining five years (even if there were breaks) – important for non-continuous employment
    - 65(1) calculation of severance pay – **one week per year worked**, plus pro-rated for months worked; (5) **max of 26 weeks**
      * multiply employee’s regular wages for a **workweek** by sum of (a) the number of years of employment the employee has completed; and (b) the number of months of employment not included in clause (a) that the employee has completed, divided by 12 (*pro-rated for months*)
    - **Severance *cannot* be satisfied with working notice! Must be money!**
  + **Releases**
    - employer will want to get a release of claim from that employee so they can be confident they are not going to face a lawsuit in the future
    - You can only get a release if you are paying something *more* than a statutory requirement (otherwise lack of consideration)
  + Important: see the **EXCEPTIONS** in Ont Reg 288/01 and frustration
    - **2(1)** employees not entitled to termination – has a list – main ones outlined below
      * Employee guilty of ***wilful* misconduct**, disobedience, wilful neglect of duty that is not trivial and has not been condoned
        + Very high threshold due to element of wilfulness (*Oosterbosch*)
        + Not the same as just cause at common law (*Oosterbosch*)
        + *Oosterbosch*

Series of issues w/ employee: attendance issues, production, falsified records, etc. Employer argued wilful misconduct

Held: employee careless; but does not rise to the bar of wilful or reckless; even though just cause established

* + - * Construction employee
      * Temporary layoffs
      * Contract frustrated
    - **9(1)** employees not entitled to severance pay
      * an employee whose employment is severed as a result of a permanent discontinuance of all or part of the employer’s business that the employer establishes was *caused by the economic consequences of a strike*
      * some similar ones to above – wilful misconduct
    - **Contract frustrated**
      * This is a common law doctrine and also mentioned in ss 2(1) and 9(1) of Reg 288/01
      * See this below – separate section!!
  + **Mass Terminations** (s 58)
    - 50+ employees terminated in period of 4 weeks
      * All of those people *entitled to same amount of notice*
      * Notice period varies w/ # of people terminated
    - This notice not effective until you send a Form 1 to Ministry and post it in your workplace
    - Wood v CTS (bit confusing!)
      * Motion judge erred in finding that Form 1 notice had to be given on date employees were given notice of future layoffs
      * Under s 58 of ESA Form 1 notice must be given on first day of statutory notice period
      * Since employer was 12 days late in serving and posting Form 1 notice, class members were entitled to further 12 days' pay in lieu of notice
* **Maximum Hours of Work** – s 17
  + **8 hours/day and 48/week**
  + See **exemption** in Ont Reg 285/01 will exempt certain workers from requirement
  + Process under legislation where employers/employees may agree to increase max hours of work (hours of work agreement)
    - Must be in writing and be provided ministry-information sheet
    - No longer need ministry approval
* **Overtime** – s 22
  + Employees get overtime pay for every hour they work above 44 hours in a workweek or some other lower threshold established by contract
  + They get 1.5x regular rate of pay for additional hours
  + See **exemption** in Ont Reg 285/01 will exempt certain workers from requirement
  + Can get written agreement w/ employee to **average overtime work** (s 22(2))
    - Averaging period can be 2+ consecutive weeks
    - Averaging agreement needs expiry date not longer than 2 years from agreement
* **Minimum wage** – s 23, 23.1
* **Leave of absence** – ss 45-53
  + S 45 Definitions
  + Ss 46-47 Pregnancy leave
  + Ss 48-49 Parental leave
  + S 49.1 Family medical leave
  + S 49.2 Organ donor leave
  + S 49.3 Family caregiver leave
  + S 49.4 Critical illness leave
  + S 49.5 Child death leave
  + S 49.6 Crime-related child disappearance leave
  + S 49.7 Domestic or sexual violence leave
  + S 50 Sick leave
  + S 50.0.1 Family responsibility leave
  + S 50.0.2 Bereavement leave
  + S 50.1 emergency leave, declared emergencies
  + S 50.2 Reservist leave
  + **General Provisions regarding leave** – important for all!
    - 51 rights during leave
    - 51.1 Leave and vacation conflict
    - 52 Length of employment
    - 52.1 Leave taken in entire weeks
    - 53 ***Reinstatement* as the default remedy (**but just for leave!)
      * employer shall reinstate the employee to the position the employee most recently held with the employer, if it still exists, ***or*** to a comparable position, if it does not
    - 53.1 Leaves apply separately

# Canada Labour Code

* Code divided into 3 parts
  + Part 1 – unionized workplaces
  + Part 2 – health and safety and accidents
  + **Part 3 – employment standards** (key part for us!)
* Hours of work – s 169
  + 8/day, 40/week
  + Total hour max: 48 hours/week
* Work schedule provided 96 hours in advance (otherwise right to refuse) – s 173.01
  + Exceptions re emergencies
* Overtime – s 174
* Minimum wage – s 178
  + Refers to minimum wage at the province – therefore uses ESA for the purposes of determining this
* S 181.1, 181.3
  + Employees can take unpaid breaks necessary for medical reasons
* S 177.1 🡪 flexible work arrangements
* **Leaves** – s 204-207 (personal leave specifically s 206.6)
* **Termination pay** – s 230
  + 2 weeks termination or 2 weeks pay in lieu of notice for employees who have worked 3+ months
* **Group termination** (mass) – s 211
  + 50+ employees = notice
* **Severance Pay** – s 235
  + If completed **12 months** of service, get severance pay
    - Unlike 5 years in Ontario
  + Amount of severance pay is **greater** of 2 days wages for each completed year of service **or** 5 days wages
* **Unjust Dismissal** – s 240 – *different than wrongful dismissal*
  + S 240(1) unjust dismissal complaint available to employees who have worked 12+ months of continuous employment **AND** who is *not* a member of a group of employees subject to a collective agreement **AND** who is *not* a manager
    - To be just, requires “objective, real, and substantial cause independent of caprice, convenience, or purely personal dispute” (*CIBC v Boisvert*)
  + S 242(3.1) **no complaint if**
    - (a) complainant laid off because of lack of work or discontinuance of function
    - (b) a procedure for redress has been provided under Part I or Part II of this Act or under any other Act of Parliament
  + S 241(1) employer must provide reasons for dismissal upon request
  + S 241.2 rejection of complaint – grounds (e.g. frivolous, vexatious or not made in good faith; complaint settled in writing; other means available to the complainant to resolve the subject matter of the complaint; complaint adequately dealt with through recourse obtained before a court, tribunal, arbitrator or adjudicator)
  + 242(4) **Remedies**
    - (a) pay remuneration
    - (b) **reinstate the person in his employment** (unique to CLC)
    - (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal
  + S 246(1) No civil remedy of an employee against his employer is suspended or affected by sections 240 to 245. – still have civil remedy
  + ***Wilson***
    - Employee worked for 4.5 years when dismissed w/o cause. Severance package of 6 months pay
    - Statutory entitlement would be far less based on 2 week severance (2 weeks + 2 days).
    - Unjust dismissal complaint
    - Federal employers are not allowed to terminate without cause non-unionized non-managerial employees with 12+ months of service, even if willing to provide generous notice and severance pay
      * But employers can still lay off such workers due to lack of work or discontinuous of function
    - Employee can choose to challenge unjust dismissal action or through common law reasonable notice
    - Only employees who are not covered by unjust provisions are entitled to severance pay (?!!! Not sure if this is correct!!)
  + An employee may still file an unjust dismissal complaint even if they signed a release (*BMO v Li*)

# Frustration

* Frustration occurs when the circumstances of the contract formed have subsequently changed so dramatically that further performance of the contract would either be impossible or radically different from the parties’ original intention
  + Effect: The contract will then be terminated without liability
* Will not frustrate contract of employment unless there are *exceptional circumstances*
* Concept of self-induced frustration does not normally excuse performance
  + E.g. if employer goes bankrupt
  + However, self-induced frustration can lead to frustration in limited circumstances
    - E.g. employee’s own conduct can constitute frustration in certain circumstances 🡪 for instance, you lose a certification or become imprisoned
* **Frustration and imprisonment**
  + ***Hare***
    - Worked for company for 25 years; imprisoned for 12 months; after he got out, did not get job back. Employer argued contract frustrated by prison sentence
    - how long does prison sentence need to be to frustrate employment contract?
      * **12-month sentence frustrated the K**
      * Self-induced here
    - Length of prison term that will frustrate K **depends on certain factors**:
      * (1) Length of service and position held
      * (2) Length of contract deviation (how long will he be away from work b/c of prison sentence)
      * (3) what is nature of the job and reason for imprisonment
        + Does employee have to be replaced immediately?

E.g. CEO absence can’t be tolerated for long but lower level employee can

* **Frustration and Disability**
  + *Dartmouth*
    - Captain of steamer that got sick and couldn’t work
    - Held: A ***permanent* disability** on the part of an employee which *prevents* him from discharging his duties under the employment contract will result in frustration of the contract
  + *Marshall v Harland*
    - Employee in 1946 and became ill 1969 – company did not provide sick pay – employer said they are closing London work and closing K
    - **Five part Test**
    - (1) Do the terms in K include provisions re sickness pay?
      * when K provides for sick pay, it is plain that K cannot be frustrated so long as employee comes back to work to appears likely to come back to work within such period when it is payable
    - (2) how long employment was likely to last in absence of sickness/disability
      * relationship less likely to survive period of incapacity if inherently temporary or short duration
    - (3) how long has disability lasted and how long will it last?
    - (4) nature of the employment
      * Lower level position or lots of people = more likely to survive period of incapacity rather than if someone is a CEO or key post
    - (5) how long have you been employed? Long-standing or short-standing relationship?
  + *Atlantic provinces*
    - Employee resident counsellor at school for physically and mentally disabled children
    - Could not perform substantial duties b/c he could not lift kids over 30 pounds
    - This disability was performance
    - Here contract was frustrated – could not perform substantial duties of job
  + *White*
    - Employee had been off for back injury for 10 months
    - Got letter from employer if could not come back within 30 days, firing you
    - 10 month absence did not frustrate K
    - **Absence of 18-24 months reasonably in contemplation of parties – not frustrated**
  + *Demuynck*
    - Employee off work on long term disability for 20 months and prognosis need to be off for at least 7 months
    - Employee terminated before 7 months ended
    - K was frustrated b/c court said 27 month period fell outside 18-24 month range
* **What if employment contract provides for disability benefits?**
  + Therefore usually not kind of unexpected event as typical in frustration
  + *Antonacci*
    - Injury in April 1994, person returns unmodified work duties
    - Held that not unforeseen**; sick policy foresaw long-term illness**
      * **K of employment contemplated lengthy period of absence**
    - And not a permanent disability
    - Can only make decision if you have up to date medical information at time making decision
* **Intersection with statute**
  + *Mount Sinai*
    - Nurse for 13 years, terminated for innocent absenteeism (injured, depression, she had relapse and approved for long-term disability benefits, doctor thought in long term she could return to work)
    - If K is frustrated, do not need to pay minimums under ESA
  + After Mount Sinai (NEW LAW): Ont Reg 288/01 ss 2, 9 – do not need to pay termination or severance pay if K is frustrated
* **Onus**
  + *Naccarato*
    - **Onus** in proving frustration due to disability is on the ***employer***
    - **Test**: Whether employee will be able to **fulfill basic obligations** in the foreseeable future, and is there *definitive medical information*?
    - APPLICATION IN THIS CASE: Where doctor tells employer that employee is still begin treated, employer must wait for more definitive answer re prognosis before they can claim frustration
      * If not good medical evidence, as in this case, then not frustrated
      * Should have asked doctor follow-up questions
  + *Roskaft* (case w/ frustration applied)
    - Short term disability benefits
    - Dec 2014 insurance company wrote that P could not come back to work b/c performantly disabled in relation to their occupation and any other
    - Once they got this info, co did ***nothing*** for 9 months
    - Then they concluded based on length of absence, that P was unlikely to return to work within reasonable time and told P they were frustrating his K and paid minimum compensation
    - Employee sued for wrongful dismissal – not frustrated and employer did not have proper info re returning to work
    - Medical condition was unknown and unknown whether he could come back in the foreseeable future
    - P argued Not enough certainty to decide that there was frustration
    - HELD: that there was **enough evidence** overall to justify dismissal based on frustration
      * Continued to pay long term disability
      * P did not say that he had improved
      * Was reasonable for company to conclude at time of termination that he would not return in a reasonable time
      * Suggested that employer would rely on insurance co’s decision
        + In a typical case, this result would be unusual – where you would rely on insurance company’s info

Consider that but get up-to-date medical from employee that will tell you whether they have a reasonable possibility of coming back in the near future

Warn them that you are considering frustrating K – so they are on notice

# The Employment Contract

* **Implied Terms in Employment Relationship**
  + Precursor:
    - Similar to general contract law, there are contractual terms implied into the employment contract
    - Parties free to modify implied terms but ***cannot*** *contract out of minimum under ESA*
    - **Onus** is on the party who alleges existence of the implied term (party who relies on the implied term) to persuade the court of its necessity in order to give biz efficacy to the contract
  + **Duty of loyalty/fidelity** – employee owes this duty to the employer. **Employee is under a duty not to undermine his/her employer’s interests**.
    - #1 you **cannot compete with your employer** while you work for them.
    - #2 duty **not to reveal employer’s trade secrets** or confidential information.
    - #3 basic duty to **follow employer’s lawful instructions** and do work to the best of your ability.
    - Main sources of litigation: typically employees who compete with employer or divulge confidential information
  + **Duty to exercise reasonable skill and care** – employee owes this duty to the employer
    - Implied term in law but *watered down now* (no longer strong duty – difficult to find breach of this duty)
    - Theory is employers are the ones who should evaluate if someone has the skills for the job
  + **Duty to provide “fair” remuneration** – employer owes this duty to employee. assuming services are rendered, implied term that employee should be paid for the work
    - NOTE: *Usually this does* ***not*** *come up since usually it is* ***stipulated*** *in every employment contract.*
      * Recall that you can vary these implied terms through K so long as they comply with ESA minimums
  + **Duty to provide work** – duty of employer to employee. USUALLY: Not necessarily required to give employee work, but must pay them. **Exceptions** where this duty exists: where work performed gives a **reputational benefit to the employee**, such as the work of an actor, radio, or TV performer, then there is a duty to provide work (similar to executive positions like a CEO whose reputation would be harmed if it is known they were not give work)
    - Case: ***Potter***: (march 11 lecture)
  + **Duty to ensure a safe workplace** – duty implied into all employment relationships at a time when there wasn’t comprehensive occupational health and safety legislation. Not used much anymore (*although still exists*) because there are comprehensive occupational health and safety legislation
  + **Duty to provide reasonable notice of termination** – duty owed by employers to employees. Implied term in every employment contract that if you are terminating someone **without cause**, you must give them **reasonable notice** ***unless*** *you negotiate otherwise in compliance w/ ESA* (must be very clear – termination clauses discussion in this lecture is relevant)
    - **Common law amount deemed to include statutory minimums**
      * You do NOT get common law amount AND statutory minimums
  + **Duty to provide reasonable notice of resignation** – duty owed by employers to employees. Discussed later in course
* **Interpretation of Employment Contracts**
  + More than a commercial bargain. Must interpret employment contracts and obligations differently than standard commercial contracts
  + Interpretative principle: May need to examine rest of agreement to define particular term
* Preferred way to provide reduce risk: **employment agreements**
  + You may want to add terms in addition to implied terms
    - E.g. Terms you may want to include: Probationary period, compensation, requirement to abide by certain policies, bonus, confidentiality, etc. (more below)
  + You may want to vary the implied terms or remove them
  + Goal: You want certainty
* **Usual Terms In Employment Contracts**
  + Description of duties (sometimes provided but not in all contracts)
  + Who you report to
  + Background checking – if the company is engaging in background checks
  + Probationary period (e.g. first 3 months, can end)
  + Hours of work
  + Compensation (hourly rate or annual salary, commissions, bonus, etc.)
  + Benefit plan
    - Stock options, etc.
  + Termination scenarios
    - Resignation – if you want to leave, how much notice you must give
    - Termination (without cause)
    - Just cause (termination w/o getting anything) (+ recall wilful standard for ESA not to get anything – diff than just cause)
  + Restrictive covenants
    - Bind an employee after they leave
    - Do not put it into every contract, only where you need it
  + Employee handbook/policies
    - Requirement to abide by certain policies
    - In order to have contractual force, must reference it in the contract and provide the manual (more detail later in this summary)
* Best practice is to **provide employees with time to sign the employment contract**.
  + Usually at least a few days to a couple weeks. The more complex the employment relationship, the more there is an onus on the employer to read it and understand it. For senior employees, usual term that you have some time and may receive independent legal advice
* Don’t let them start work without signing it – if you give them offer and they start working, what is the consideration? Not the job – already K’d into. You must re-wind and do consideration again. E.g. signing bonus
* **Defeating Terms in Employment Contracts**
  + (1) Examine the rest of the agreement to find the meaning of a term
    - *Clarke* (valid): Do not look at words in isolation; look at entire content of clause to determine the context
      * Termination clause challenged:
        + *Your employment may be terminated without cause for any reason upon the provision of reasonable notice equal to the requirements of the applicable employment or labour standards legislation. By signing below, you agree that upon the receipt of your entitlements in accordance with the legislation, no further amounts will be due and payable to you whether under statute or common law*
      * Challenge to termination clause where employee argued that ambiguous termination clause – used reasonable notice which is associated with common law reasonable notice
      * CoA: must take the words not into complete isolation but consider them with the clause as a whole
      * Although it uses a term that could be confusing, it defined what reasonable notice could have meant; therefore no ambiguity here
  + (2) Lack of mutual consent (missing terms – e.g. compensation)
    - Julie’s
      * Court will not make K for parties who have not come to an agreement on terms themselves
      * Fixed term K (has start date and end date)
      * Employee leaves before the two year period
      * Employer brought the action
      * Court finds employment contract is unenforceable – K itself said parties would agree on employee’s compensation later
      * **Not mutual consent on essential terms here – will strike the K**
  + (3) Violation of employment standards legislation = unenforceable \*\*
    - If you offer less than minimum under employment standards, then the clause will be unenforceable
    - Will examine this more in the in-depth termination clauses discussion below
  + (4) Pre-contractual fraudulent or negligent misrepresentation (*Queen v Cognos*)
    - Employee hired by company for a specific project; employee had to put a lot of thought into whether or not t o take the job b/c he lived in Calgary and job was in Ottawa. He moves from Calgary to Ottawa to take job.
    - Employer never told him in the interview process or in the employment agreement that the entire project was contingent on the company getting funding. He assumes everything is fine. He moves to Ottawa, funding falls through, he is terminated within 3 months and the K had an unfriendly termination clause
    - This was an omission. It was negligent. Consequence of contractual relationship as a result of negligent misrepresentation?
    - Employment contract invalid b/c of negligent – sued for damages
    - **Employer is obligated to exercise reasonable care when making a representation upon which a job applicant is relying and making a decision**
      * **This *applies equally* to a material omission**
  + (5) Invalid variation of an existing employment contract without consideration
    - If you make changes that are neutral or unfavourable to employee (e.g. change work hours from 9-5 to 7-3), you cannot unilaterally change their employment
    - If you change terms that are fundamental to contract, you can have a *constructive dismissal* case
  + (6) *Contra Proferentem* (*Norgren*)
    - *If there is an ambiguity*, construed against the drafter of the K (which is usually against the employer)
    - But there must be an ambiguity to begin with
    - E.g. “Date of termination” 🡪 what is this? Date of lawful termination? Date that you terminated employee
    - *Norgren*
      * Sophisticated employee – finance VP
      * Single fixed term K here for 3 years. Employer lets him go after 23 months (2/3 of the way through). Employee says that he must be paid for last few months
      * In lawsuit, Argues he is entitled to common law reasonable notice
      * K contains language: this agreement will time out in three years and goals will be reset.
        + This language is ambiguous

Nothing that says after 3 years employment will be over

Do not know what this means

Contra proferentum – resolve ambiguity as against the drafter of the K

Awards common law reasonable notice of 8 months

* + (7) Unconscionability (*Nardocchio*)
    - Unconscionability = Substantial inequality between parties coupled with unfair or harsh bargain
    - Unconscionability can result not only from the time the K was entered into, but can ***become*** unconscionable over time
    - CIBC (employer), Nardocchio (bank teller) – over years promoted to assistant accountant
    - At the time she was hired, signed employment agreement which said 3 months notice – complied with CLC (Canada labour code)
    - She brings an action alleging that entitlement she had under that contract was unconscionable
    - No unconscionability at the time it was signed – relatively fair, complied with ESA, bank teller, etc. But 13 years later when she is far more knowledgeable, it is way less fair
    - Held: K is unconscionable in light of her skills, experience, etc. which ended up being 12 months
    - It would have been wise for CIBC to bring to her attention the contract when she was promoted to a managerial role
  + (8) Substratum Doctrine
    - Preliminary comments
      * Often linked with unconscionability and plead together
      * Idea that underlying reality has changed so fundamentally that it is no longer appropriate to use this K to define this job anymore
      * Power imbalance is **NOT** essential for substratum – but unconscionability there needs to be
    - Schmidt
      * Professional engineer w/ company for 25+ years, brings wrongful dismissal action, bring out employment agreement from 1975
      * The court held that Schmidt started in low level job, became very senior in company, that substratum (reality) of what he was doing on a daily basis looks nothing like what he was doing when he first started (especially given the technological advancement, etc.)
    - Rasanen – says same thing as Schmidt
* **Fixed Term vs Indefinite Term Contracts**
  + Fixed term has a start date and an end date
  + Indefinite term K only has a start date
  + Have been employers in the past who have taken concept of fixed term in order to try and get around notice upon termination
  + *Ceccol* (held indefinite term employee – contrast with *Flynn*)
    - Gymnastics coach continuously works on 1 year contracts
    - By termination, she was working there for 16 years
    - They offer her three month pay, but she wants more and sues
    - Issue: is she an employee pursuant to a fixed term contract that successively gets looked at again and again, or is she an indefinite employee?
    - Employers cannot evade traditional protections of employment standards legislation and common law by calling something fixed term when **underlying reality is continuous service by employee for a number of years, *especially* when coupled with verbal representations and comments that signals an indefinite relationship**
      * Never anticipated shortages, etc.
    - Awarded common law reasonable notice for full duration of her work there
  + *Fylnn* (held fixed term employee)
    - Flynn hired by brokerage firm in 1988, in ‘99 decides they will handle employment affairs differently and move everyone to 1 year contracts
    - He signs and agrees to it, signed it for 3 years, negotiations break down afterward and employer offers a lumpsum payment as a goodwill gesture
    - Held: this is a proper series of fixed term contracts for three years. Why the result is different
    - Here:
      * #1 no inequality of bargaining power, Flynn sophisticated person, *he negotiated them*, etc.
      * #2 Was not able to lead evidence that he was an indefinite employee – unlike employee in Gymnastics could not lead evidence that the was verbal conduct suggesting he was an indefinite employee, history of yearly term contracts
    - Much shorter duration, no inequality of bargaining power, sophistication, no evidence re = valid successive yearly contracts
  + *Norgren*
    - Sophisticated employee – finance VP
    - Single fixed term K here for 3 years. Employer lets him go after 23 months (2/3 of the way through). Employee says that he must be paid for last few months
    - In lawsuit, Argues he is entitled to common law reasonable notice
    - K contains language: this agreement will time out in three years and goals will be reset.
      * This language is ambiguous
        + Nothing that says after 3 years employment will be over
        + Do not know what this means
        + Contra proferentum – resolve ambiguity as against the drafter of the K
        + **Held that employee was an indefinite term employee**
        + Awards common law reasonable notice of 8 months
* **Employee Handbooks and Manuals**
  + Courts have been vigilant in preventing unilateral modification of implied rights afforded to employees through documents which are not clearly contractual in nature
  + **When can employers hold employees responsible for breaching policy?**
    - (1) **reference policies in employment contract**: Can create ancillary contractual terms that flow from policies and handbooks ***IF*** *both the employer and employee understood that those are conditions of employment*
      * They must be clearly contractual in nature
      * Employer cannot unilaterally change the terms
      * Policies/additional documents must be contractual in nature
      * If not contractual, no consideration given or no evidence of contractual intention on both parties
    - OR: (2) if you roll it out after when employee is already working for you, **can give them some consideration in exchange for them signing it**
      * E.g. if you sign off on it, you get a signing bonus of $500
    - Just signing a document acknowledging that they have read it is **not** enough (otherwise may be held to be no contractual intention)
      * 4 things you need:
        + Received it
        + Reviewed it
        + I understand it
        + I agree to abide by it
    - **It must be binding on the employer too** – otherwise employer can’t rely on the policy
    - *ASM Corrosion Control* – case where employer did everything correct, golden standard (except not having employment K)
      * Employer is suing employee
      * Employee does not have a written contract, but rather an employee manual
      * Parties end up in litigation over educational course that he takes and who should bear responsibility of cost of paying for the course
        + Beneficial to both him and employer
        + Employer pays for the course. One month after he takes the course he resigns
        + Employer produces employee manual, required to repay the course (contravenes policy if resigns so quickly)
      * Employer sees to enforce employee manual
      * Issue: is the employee manual binding?
      * Held: yes it is binding
        + #1 employer gave employees the manual when beginning employment and everyone had to sign off on it
        + #2 made it readily available in the workplace
        + #3 acknowledgement made it clear that the employees understood that the terms were binding, every time the manual was revised in (minor) ways, they re-signed it (note: shifts in major ways require consideration)
        + Summary*: Contractual intention, consideration, signed off on it, provide easy access, clearly communicated*, not case of employer using unequal bargaining power(not unconscionable)
    - *Dawson* – policy held not enforceable
      * **BLL**:
        + **Manual never part of terms and conditions of employment to start with – given to her after she was working w/ no consideration**
        + Even if it had been, very policy the employer relied on required them to do certain things that they did not do

**Must abide by it yourself if you want to enforce it against your employees**

* + - * Facts:
      * Hired by employer, no written K of employment; given employee handbook but unlike ASM only given handbook 9-12 months after started working (consideration issue)
      * Stays w/ company for 14 years and terminated for just cause. She operated machine in a plant, they put her on a new machine but did *not* train her how to use it properly, therefore her production quality was bad, she argues that they should have trained her
      * She brings an action, Employer defends based on complying w/ progressive discipline policy that is included in the handbook (if we must discipline you 4 times in 12 months, then termination for cause)
      * Held:
        + #1 did not train her at all and did not try to help her
        + #2 once you hit forth stage, must have detailed review of scenario before termination, they DID NOT do that
        + #2 there was another policy not abided by – Did not give opportunity to respond and tell her story
* **What Employee Is Owed On Termination**
  + **Common Law Reasonable Notice** *(notice length determined by age, service, position, chances for re-employment)*
    - **UNLESS…**
    - **(1) Employment Contract with Valid Termination Clause**
    - *consideration, ESA compliance, pay out per contract*
    - **(2) Just Cause**
    - *No notice or pay in lieu of notice owing – but termination and severance pay under ESA still required unless willful disobedience (Oosterbach)*
    - **(3) Frustration of Contract**
    - *ES/LS minimums (province dependent – not Ontario see above lectures)*
* **Contractual Termination Clauses**
  + Employers are strongly recommended to set out, in a written employment contract, the amount of notice/pay in lieu of notice owing to an employee in the even that his or her employment is terminated without cause
  + By doing so, an employer can “contract out” of its obligation to provide common law reasonable notice to an employee
    - However, **it must be done properly**
  + Attacking termination clauses in employment contracts:
    - Lack of clarity;
    - Unconscionability;
    - Lack of consideration;
    - Duress;
    - Misrepresentation; or
    - **Non-compliance with employment standards legislation**
      * Our focus here – The rest of the ways were already talked about above
  + Termination clause **must be compliant with ESA at all periods of time!**
    - Play them through with various scenarios – does the clause always comply with ESA? Must always provide at least ESA. Not just moment of termination
    - The clause itself must be complaint – just because you pay out the person an amount in compliance voluntarily does not mean you are in compliance with ESA (owed CLRN)
  + *Clarke* (valid): *Do not look at words in isolation; look at entire content of clause to determine the context*
    - Termination clause challenged:
      * *Your employment may be terminated without cause for any reason upon the provision of reasonable notice equal to the requirements of the applicable employment or labour standards legislation. By signing below, you agree that upon the receipt of your entitlements in accordance with the legislation, no further amounts will be due and payable to you whether under statute or common law*
    - Challenge to termination clause where employee argued that ambiguous termination clause – used reasonable notice which is associated with common law reasonable notice
    - CoA: must take the words not into complete isolation but consider them with the clause as a whole
    - Although it uses a term that could be confusing, it defined what reasonable notice could have meant; therefore no ambiguity here
  + *MacDonald* - Clause that sets a ceiling is a problem, *not* if it sets a floor
    - Termination clause: the company can terminate employee’s employment without cause by providing no less than one month’s notice at any time
    - Employee challenged this b/c one month would not be valid at certain points
    - Employer says it will set a floor, not a ceiling
    - Held: in favour of employer. **Clause that sets a ceiling is a problem, not if it sets a floor**
  + *Wright* - Must continue benefit pay in the termination period
    - *“…This payment will be inclusive of all notice statutory, contractual and other entitlements to compensation and statutory severance and termination pay you have in respect of the termination of your employment and no other severance, separation pay or other payments shall be made.”*
    - Clause contracts out of ESA to extent that it would say that it does not have to pay for or continue benefits during statutory termination period
    - **Must continue benefit pay in the termination period**
    - **This is a ceiling b/c there is no room with how they drafted for continuation of benefits** (Because they said inclusive of all statutory, contractual and entitlements)
  + Stevens – follows *Wright*
    - *“The Corporation may terminate your employment without cause at any time by providing you with notice or payment in lieu of notice, and/or severance pay, in accordance with the Employment Standards Act of Ontario…You agree to accept the notice or payment in lieu of notice and/or severance pay…in satisfaction of all claims and demands against the Corporation which may arise out of statute or common law with respect to the termination of your employment with the Corporation.”*
    - Attempts to restrict employment standard entitlements
    - Stevens had few arguments:
      * (1) referred to wrong Act (Employment Standards Act, 2000)
        + Lost on first argument – everyone knew what we were referring to
      * (2) clause would exclude benefits continuation in same way
        + “Take payments in satisfaction of all claims that may arise under statute”
        + Wins on this – follows Wright
  + *Wood v Fred Deeley* – benefits continuation; must satisfy severance pay w/ money (not notice) – clause must provide for that
    - *“[The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks’ notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph…. The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the Employment Standards Act, 2000”*
    - ONCA held clause contravenes ESA for two reasons:
    - (1) it doesn’t provide for benefit coverage 🡪 “shall not be obliged to make any payments to you other than those provided for in this paragraph”
    - (2) Doesn’t appropriate provide for severance. ss 64-65 ESA states that you can’t satisfy severance pay with anything other than money (*not* through notice (unlike termination pay) or any other means). Therefore providing 2 weeks notice contravenes the Act
  + *North Metaswitch Networks Corp* – notice must include payments for commissions and all other compensation, otherwise invalid, and can’t use severability clause to fix termination clause
    - ***“9. Termination of Employment***
    - *(c) Without Cause – The Company may terminate your employment at any time in its sole discretion for any reason, without cause, upon by [sic] providing you with notice and severance, if applicable, in accordance with the provisions of the Ontario Employment Standards Act (the “Act”). In addition, the Company will continue to pay its share all [sic] of your employee benefits, if any, and only for that period required by the Act. […]*
    - *The reference to notice in paragraphs 9(b) and (c) can, at the Company’s option, be satisfied by our provision to you of pay in lieu of such notice. The decision to provide actual notice or pay in lieu, or any combination thereof, shall be in the sole discretion of the Company. All pay in lieu of notice will be subject to all required tax withholdings and statutory deductions.*
    - *In the event of the termination of your employment, any payments owing to you shall be based on your Base Salary, as defined in the Agreement.”*
    - There was also severability clause later in employment agreement that said if any portion of contract is deemed to be invalid at law that part will be struck and the rest of it will stay
    - Held:
    - **#1 termination clause invalid b/c employee will get not only salary but also commissions in job and nothing in clause deals with commission**
      * **Notice must cover all remuneration of employee!!**
    - **#2 cannot use severability clause to fix termination clause in employment contract; it is not what those type of clauses are intended to do**
  + *Amberber v IBM* – must read termination clause as a whole; can include fail-safe provision to save otherwise invalid termination clause
    - *“If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary. This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation. In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment (“statutory entitlements”) than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment.”*
    - Motion judge divides clause into three parts and does analysis based on that
    - CoA held motions judge erred in doing that – **must read the clause in its entirety** (as a whole) to determine the meaning of the clause / whether there is any ambiguity
      * When termination clause read in its entirety there is no doubt as to the clauses meaning
    - #1 the options aren’t valid b/c severance pay must be paid in cash, not notice (*Wood*)
      * However, clause has a fail-safe provision, in case statutory entitlements higher, then statutory entitlements
  + *Nemeth v Hatch Ltd* – K needs intention to displace CLRN but not precise language to that effect; just because you are silent about severance pay, doesn’t mean you contracted out of it
    - *“The Company's policy with respect to termination is that employment may be terminated by either party with notice in writing. The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation”*
    - Nemeth has 19 years of service; employer gives him 8 weeks of statutory termination pay and 19.4 weeks of severance pay
    - Challenges clause on few points:
      * (1) Termination clause doesn’t expressly contract out of CLRN – i.e. does not state that it is inclusive of all payments you are owed, etc… similar to other clauses
      * (2) doesn’t reference severance pay at all
    - Held:
      * (1) although there is a need for clarity in the context of drafting clauses that displace an employee’s common law notice entitlement, *parties are not required to “use a specific phrase of formula”* or include language such as “the parties have agreed to limit an employee’s common law rights on termination.” The Court noted that “it suffices that the parties’ intention to displace an employee’s common law notice rights can be readily gleaned from the language agreed to by the parties.”
      * (2) **Just because you are silent with severance pay doesn’t mean you contracted out of it** 
        + In order to have a problem with the enforceability of the termination clause you have to contract out of it
    - RATIO: As long as you are not totally contracting out of severance pay you might be okay; two possible interpretations and we should give him 19 weeks of notice; minimum of 4 weeks simply provides minimum floor and didn’t try to turn it into a statutory ceiling
    - NOTE: this is quite in conflict w/ other decisions which states that severance pay needs to be paid in cash not notice… however this clause is more ambiguous
  + *Andros v Colliers Macaulay Nicholls Inc* – disjunctive nature of clause creates problems
    - *“4. The company may terminate the employment of the Managing Director by providing the Managing Director the greater of the Managing Director’s entitlement pursuant to the Ontario Employment Standards Act or, at the Company’s sole discretion, either of the following:* 
      * *(a) Two (2) months working notice, in which case the Managing Director will continue to perform all of his duties and his compensation and benefits will remain unchanged during the working notice period.*
      * *(b) Payment in lieu of notice in the amount equivalent of two (2) months Base Salary.”*
    - Facts:
    - Andros has just over 10 years of service when employment is terminated
    - Employer pays him out his 8 weeks termination pay, benefits, statutory severance pay plus additional amounts on top of that
    - Challenges clause and says it contracts out of ESA
    - Andros argues that A does not allow for severance pay and B mentions neither severance pay or benefits
    - Held: CoA agrees with Andros – b/c of language “sole discretion” and multiple options, some of which do not comply w/ ESA, it’s not enforceable
      * the motions judge concluded that if 4(a) applied, the employee would arguably not be entitled to ESA severance and, if 4(b) applied, the employee would arguably not be entitled to benefits continuation as required by the ESA
      * even though it had a fail-safe option, it was not standalone option and it said “or” which meant it did not apply to the two options and “sole discretion” – large issues here
    - They were not merely silent about statutory entitlements unlike Nemeth – specifically mentioned benefits in clause followed by problems in clause
    - Disjunctive nature of termination clause presents a bunch of the problems. The only full compliance with the ESA is the introductory section and moment you added work OR doesn’t suggest that reference to ESA is pulled down to A or B; both A or B have ESA compliance problems

# Human Rights

* One year limitation period!! OHRC
* **Features of Human Rights Legislation**
  + **Purpose** is *remedial*, **not** punitive
  + Rights should be interpreted broadly and expansively and defenses should be interpreted narrowly*:* (*CNR v Canada*)
  + Human rights legislation is “quasi-constitutional” (*Winnipeg*)
    - exceptions cannot be created unless there is a clear legislative pronouncement that it is being done
    - If all other factors are equal, if you have decision of HR tribunal, this will take precedence over a decision that is based on a less fundamental administrative scheme
  + Human rights legislation cannot be waived or varied by contract (**Winnipeg School**)
    - to the extent private contract conflicts with HR statute, HR statue will govern
* Jurisdiction: courts vs commissions
  + No common law tort of discrimination (*Bhadauria*)
  + Ontario human rights system is comprehensive (*Bhadauria*)
    - Legislative initiative (HR Code) had overtaken existing CL in Ontario in this area and set up different regime
    - Didn’t exclude courts but made them part of enforcement mechanism
    - ON HR system is comprehensive in its administrative and adjudicative features – this forecloses a civil action based on breach of the Code
* **The System**
  + “Direct Access” model at the Ontario Human Rights Tribunal
  + Complaints would go directly to HR tribunal which would do the fact gathering and mediate a case; if it couldn’t be resolved, it would go to adjudication
  + **s 34 One year limitation period – important!!**
    - 34(1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,
      * (a) within one year after the incident to which the application relates; or
      * (b) if there was a series of incidents, within one year after the last incident in the series.
    - **Late applications** – 34(2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.
  + Detail required from the parties upfront
  + Defined timelines
  + No longer a $10,000 cap on damages for injury to dignity, etc.
  + s 46.1 – in **civil action**, court can make order based on code contraventions but can’t base civil action solely on code contravention (e.g. need wrongful dismissal) (*Wilson*)
    - *Wilson*: Can’t bring code-based claim to court; courts have the same powers as tribunal to make a finding of discrimination and order compensation *but* the claim has to be based on another cause of action (e.g. wrongful dismissal claim or constructive dismissal claim with discrimination claim attached)
* **Increasing Damage Awards**
  + ***OPT*** – sexual harassment case - $150k damages for one party
    - Two temporary foreign workers from Mexico to work for company
    - Procedurally case was brought against company as well as respondent (individual – owner of company)
    - Both of applicants alleged they have been subjected to sexual assault, sexual solicitation and said sexually poisoned working environment
      * (1) Asking her on dates, forced touching, telling her he loved her
      * She said she felt compelled to do this because he threatened to send her back to Mexico
      * (2) Other complainant – propositioned her, touched her, threatened to send her back to Mexico
    - HELD: Sexual pattern of harassment and sexual poisoned working environment
    - Factors to be considered re: damages (right to be free from discrimination)
      * Humiliation
      * Loss of self-respect, dignity and confidence
      * Experience of victimization
      * Vulnerability of the complainant
      * Seriousness of offence of treatment
    - Went through previous decisions in sexual harassment and saw that none of them exceeded $50,000
    - Commented on unprecedented seriousness of conduct, particular vulnerability as migrant worker and impact of conduct on OPT (PSTD, psychological issues)
    - **Damages**:
    - OPT 🡪 **$150,000**
    - NPT 🡪 **$50,000**
      * NPT Conduct for shorter time and not as egregious as OPT
    - COMMENTS:  
      - since this case tendency for general damages are going up
    - Now we see a lot of $15-20,000 awards
  + ***AB v Joe Singer Shoes*** – sexual harassment case - $200k in damages
    - FACTS:
    - Brought against company and in this case respondent was owner’s son
    - Lots of unwelcome sexual conduct (forced oral sex and sexual intercourse, forced watching porn, making fun of body, her English skills, etc.)
    - Tribunal noted that complainant’s memory of these events wasn’t perfect but still found in her favour
    - Held: Found there was a poisoned working environment and award of $200,000 for injury to dignity
* **Relevant provisions**
  + **Discrimination in employment – 5(1)** Every person has a right to equal treatment with respect to employment without discrimination *because of* race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.
  + **Harassment in Employment – 5(2)** Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. (note: sex mentioned in 7(2))
  + **Sexual harassment in workplace – s 7(2)** Every person who is an employee has a right to freedom from harassment in the workplace because of *sex*, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee.
* **Discrimination in Employment – s 5**
  + S 5 Ontario Human Rights Code
  + **Applies to all stages of the employment relationship** – hiring, during the employment relationship and at termination
  + **Possible to use this part of Code where particular relationship doesn’t fall neatly into employer category** (*Schrenk* – harassed by co-worker employed by another company that complainant’s company was conducting a project with)
    - This may include discrimination by their co‑workers, even when those co‑workers have a different employer. – not just discrimination by your superiors (*Schrenk*)
    - In determining whether discriminatory conduct has a sufficient nexus with the employment context, **factors to consider**: (*Schrenk*)
      * Was the Respondent (S’s employee) integral to complainant’s workplace?
      * Did the particular conduct take place in Complainant’s workplace?
      * Was the complainant’s work performance/environment negatively impacted?
* **Analysis of Discrimination**
  + **\*important** 🡪 **all discrimination is defined by its *effect on the complainant*; the intent of the person who is alleged to be discrimination doesn’t matter**
    - ***Moore v Ferro***🡪 reinforces the whole idea that discrimination can occur not because of an ill motive but because of things like unconscious bias
      * FACTS: Lawyer who was trained in England applied for law firm position with small firm and he was of Afro-Caribean descent; interview notes 🡪 older, already entrenched in habits, other candidates were young, competitive, he was long-winded (British thing)
      * HELD: $2,000 🡪 but talk about how even if you don’t have intent to discriminate, you may still be discriminating
  + In the past, 3 buckets of discrimination – direct, indirect, systematic. Now unified approach
  + **Analysis**: (*Meiorin*)
    - (1) employee bears burden to establish *prima facie* discrimination (*Meiorin*)
      * Applicant must prove that: (*Peel Law*)
        + (1) they have a characteristic that is protected by Code
        + (2) experienced some kind of adverse impact with respect to the service at issue
        + (3) protected characteristic was *a factor* (not the cause or only factor)

No need to prove a casual nexus (*Peel Law*)

* + - (2) then onus shifts to employee to justify a discriminatory work, rule or standard as a bona fide occupational requirement – three part test (*Meiorin*)
      * (1) adopted the standard for a purpose rationally connected to the performance of the job
      * (2) adopted particular standard with an *honest and good faith belief* it was necessary for work
      * (3) have to show that the standard is reasonably necessary to the accomplishment of the legitimate work-related purpose
        + In order to meet reasonably necessary standard, have to demonstrate that it is impossible to accommodate individual employees that share the characteristic without imposing **undue hardship** on the employer
        + **Accommodation** aspect is part of third element of Meiorin test

**DTC (duty to accommodate) has two elements**

(1) Procedural, (2) Substantive

Procedural 🡪 Employer has to show procedurally it has gone through actual steps to consider an accommodation (meeting with complainant, meeting with employee, exploring different alternatives, determining why one alternative won’t work, taking notes of this. Employee has procedural duty to participate in discussions)

Substantive 🡪 why you didn’t select certain type of alternative

SEE BELOW FOR PRINCIPLES REGARDING DUTY TO ACCOMMODATE

* + ***Meiorin (BCGEU)* SCC – unified approach**
    - FACTS:
    - Woman hired as forest fire fighter performed well for 3 years
    - Employer developed physical fitness test that could ensure fitness
    - 4 tests and she passed 3 of them
    - Tests were developed from university researchers to measure whether you met physical demand
    - One she failed was a running test which required you to run in 2.5 km in 11 mins. Ran 11 mins 45 seconds
    - Once this standard was introduced she was terminated and union grieved dismissal
    - ARBITRATION:
    - Held that union had established a prima facie case of adverse effect discrimination by showing this aerobic standard had a disproportionately negative effect on women and employer had not discharged its burden to accommodate to the point of undue hardship
    - **SCC**:
    - Rejected the conventional approach (deciding which of three buckets of discrimination something fell into) and created unified approach
    - **Developed new unified approach - TEST**
      * Established *prima face* case of discrimination then onus shifts to employer
      * Employer can **justify** a discriminatory work or rule standard as a **bona fide occupational requirement**; **3-part test**:
        + (1) adopted the standard for a purpose rationally connected to the performance of the job
        + (2) adopted particular standard with an *honest and good faith belief* it was necessary for work
        + (3) have to show that the standard is reasonably necessary to the accomplishment of the legitimate work-related purpose

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Substantive 🡪 why you didn’t select certain type of alternative

* + - APPLICATION:
    - (1) and (2) 🡪 employer met
      * Rational connection between standard and way they performed job
      * Honest and good faith belief
    - (3) 🡪 fell short
      * Researchers had observed the fire fighters and measured aerobic capacity while doing tests then set standard. Hadn’t look to see whether standard was necessary to do particular job safely and never looked at differences between genders to see if some aerobic capacity was needed
      * Had a problem with lack of accommodation efforts (engaged in none)
    - Employer did not meet new unified approach and appeal was allowed 🡪 reinstated and compensated for lost wages
      * Court said when setting these kinds of standards you should consider accommodation when you are setting them (different ways of performing job while still achieving purpose)
      * Introduced a concept that we see in every disability case 🡪 **DTC (duty to accommodate) has two elements**
        + (1) Procedural
        + (2) Substantive
      * Employer has to show procedurally it has gone through actual steps to consider an accommodation (meeting with complainant, meeting with employee, exploring different alternatives, determining why one alternative won’t work, taking notes of this. Employee has procedural duty to participate in discussions)
      * Substantive 🡪 why you didn’t select certain type of alternative;
      * COMMENTS:
      * BFOR 🡪 still defined as standard that is integral for carrying out essential functions of particular job but now in order to meet that you have to meet 3 point test (accommodation concept baked into 3rd element)
  + ***Peel Law*** 
    - FACTS:
      * Lawyer and articling student in Brampton courthouse (both black)
      * Claim that librarian at courthouse had discriminated on the basis of race
      * Librarians responsibilities was making sure only lawyer and law students got into lounge; asked them to show ID but didn’t ask anyone else
      * Evidence that she had asked for it in aggressive way
      * And when asked why she wasn’t asking other people 🡪 defence that she recognized them because they are here all the time (but 2 ppl were there for first time)
    - TRIBUNAL: prima facie case of discrimination and burden switched to respondent to explain race and colour were not factors
    - Concluded that librarian had not demonstrated a lack of racial motivation
    - DAMAGES: 2000 each
    - DIVISIONAL COURT:
    - Quashed tribunal’s decision
    - Err because tribunal had reversed burden of proof because required respondents to prove there was no discrimination
    - Divisional court set out test (THAT IS WRONG) 🡪 prove causal nexus between decision and prohibited ground and disadvantage
    - ONCA:
    - No got test wrong **– no need to prove causal nexus**
    - **Applicant must prove:**
    - (1) characteristic that is protected by Code
    - (2) experienced some kind of adverse impact with respect to the service at issue
    - (3) protected characteristic was *a factor* (not the cause or only factor)
    - ***Then*** prima facie case then burden shifts to respondent to justify:
    - Burden is to explain why you did what you did
    - HELD: Tribunal’s decision reasonable and reinstated
  + **Schrenk, 2017 SCC**
    - FACTS:
      * Complainant works for engineering firm Omega
      * Supervised various employees on construction site
      * These employees worked for Construction company
      * CC employed Schrenk as site foreman
      * S even though was subordinate (reports to Complainant) to Complainant made some racist and homophobic statements, and eventually they were reported and he was removed from work site
      * Several months later; sent inappropriate emails and ended up being fired
      * Complainant filed HR complaint because of harassment against owner of construction project plus Schrenk’s employer plus Schrenk
      * Application to dismiss at tribunal level; stating tribunal didn’t have jurisdiction because no employment relationship
      * Tribunal denied this application
    - BCSC 🡪 upheld
    - BCCA 🡪 overturned
    - Tribunal granted leave to appeal
    - **SCC** 🡪
    - Tribunal 🡪 jurisdiction was broad enough to capture this relationship
    - Para 67 🡪 talks about BC HR code and says that Section X of code will prohibit discrimination against employees whenever that discrimination has a sufficient nexus with the employment context. Must engage in contextual analysis (whether tribunal has jurisdiction)
    - **Factors you may consider:**
      * Was the Respondent (S’s employee) integral to complainant’s workplace?
      * Did the particular conduct take place in Complainant’s workplace?
      * Was the complainant’s work performance/environment negatively impacted?
    - Talked about complainant was captive audience (had to be in workplace and that is where he was suffering discrimination)
    - Discussion about whether this broadened coverage (not just employee/employer relationship) but broader
    - DISSENT:
    - Code should only apply to employer, employee or similar relationships
    - **COMMENTS**: **Still possibility for increasing jurisdiction when particular relationship doesn’t fall neatly into employer category**
    - **This may include discrimination by their co‑workers, even when those co‑workers have a different employer. – not just discrimination by your superiors**
* **Duty to Accommodate**
  + No code Definition
  + Positive obligation on employer to take steps to eliminate disadvantage to employees that result from a workplace rule or practice, physical barrier that have or could have an adverse impact on an individual or group that is protected under the Code
  + Not only relevant to disability cases but **relevant to all HR claims**
  + **Onus is on the employer** to prove accommodation efforts
  + **Principles of accommodation**
    - (1) employers have to be proactive (not willfully blind)
      * May be situation where because nature of disability someone won’t recognize it themselves (e.g. alcoholism etc.)
      * Employers have to be proactive 🡪 employers will go up to someone and say they are noticing things aren’t going well, is there something we can do to help (provide with employee assistance program)
    - (2) not one size fits all; individual analysis
      * Part of procedural/substantive analysis we talked about
    - (3) unconscious bias are problematic 🡪 basic principle is to check assumptions at the door and consider dignity of employee
    - (4) what we are responsible for as employers and what employees are entitled to is a reasonable accommodation (not perfect or employee’s choice of accommodation)
  + **Duties of employee**
    - (1) Have to communicate with employer about their needs
      * If the employer doesn’t know or could not reasonably have known, then you are not held liable as an employer for not accommodating something
    - (2) Employee has a similar procedural duty to participate in the process
      * Bring forward suggestion and consider employer’s alternative, provide medical information
    - (3) Employee cannot refuse a reasonable accommodation
  + **Undue hardship**
    - **Duty to accommodate not without limits – set by undue hardship**
      * Employer doesn’t have to change working conditions fundamentally; has duty to make changes up to point of undue hardship (*Syndicat*)
        + employer could meet test for undue hardship if characteristics of illness were such that proper operation of business were successfully hampered or employee unable to work for foreseeable future (*Syndicat*)
        + E.g. *Syndicat*: employee missing 960 days within 7 days of work, met undue hardship test
      * Due to safety risk from impairment by marijuana, where disability requires medical marijuana to be consumed on a job with significant safety risks, likely that employer will meet the undue hardship standard (*Atchinson*, *Lower Churchill*)
    - Onus is on employer if they are trying to establish undue hardship
    - whether an undue hardship exists is done on case-by-case basis
    - Some hardship is acceptable (*Renaud* – hardship must be undue)
    - **Factors (non-exhaustive) that can be taken into account when deciding something is an undue hardship** (*Central AB Dairy*) – made in context of AB HR legislation – so different factors prescribed below by ON HR Legislation
      * (1) Financial cost 🡪 influenced by size of employer
        + And outside sources of funding
      * (2) whether accommodation would require disruption of collective agreement
      * (3) moral of other employees (*but this factor largely ignored in case law\*)*
      * (4) any interchangeability between facilities and workforces (reflects size of company)
      * (5) safety risk (*Atchinson*)
    - **Ontario HR Tribunal** has more restrictive **set of factors** that it looks at re: undue hardship (prescribed in the regulations!)
      * (1) Cost 🡪 level of cost has to be something that puts operation at risk; need proof of this not anecdotal
      * (2) outside sources of funding 🡪 did you figure out if there is agency or group that can help fund alleged expense of change
      * (3) Health and safety requirements (*Atchinson*)
        + E.g. undue hardship for employer to put up with health and safety risk of person smoking 9 joints
    - **CASES:** (for the details – but you have everything you need above)
    - ***Atchinson*** – painter who works on high rise buildings; uses medical marijuana (9 times/day); undue hardship test met through health and safety concerns
      * FACTS:
      * Seasonal painter who works in high rise buildings on a swing stage (37 stories up)
      * Terminated for smoking marijuana on the swing stage while taking a break smoked joint
      * Discriminated on basis of disability; using marijuana for disability purposes
      * Claimed supervisor told him it was okay as long as he could do it on breaks (supervisor denied this)
      * Told by doctor not to operate any machinery or drive when smoking or two hours after use
      * Company’s policy 0 tolerance for drugs and alcohol
      * HELD: Found that **genuine health and safety risk and so there was no discrimination and no failure to accommodate**
      * “I would have no difficulty in concluding that the applicant’s preferred accommodation presented an undue hardship in light of the health and safety concerns particular to this workplace.”
    - ***Re Lower Churchill NFLd*** (another marijuana safety undue hardship concern)
      * Because science of determining when someone is actually impaired by marijuana is so uncertain/underdeveloped, **it is an undue hardship to allow someone to smoke marijuana in safety sensitive positions because we can’t tell re: science whether they are impaired**
      * So you employer cannot be required to accept unknown potentially serious safety risk
  + **Scope of duty to accommodate**
    - ***Hydro Quebec v Syndicat***
      * FACTS:
      * Complainant who missed 960 days of work in 7 years
      * Depression and personality disorder
      * Over the years, company accommodated her by providing light duty, gradual return to work, assigned her to position that she shouldn’t have received because of seniority
      * Off work and asked to provide updated medial info
      * Note from psychologist that talked about how she wasn’t able to work on regular basis without continuing to have serious absenteeism problems
      * Terminated and brought grievance
      * ARBITRATOR
      * Could terminate contract of employment because she wasn’t able to work for foreseeable future and Dr. note proved it
      * Union led evidence expert that she could work in a satisfactory manner if stressors were eliminated but that included stressors related to work including certain co-workers (love-hate relationship), issues in family 🡪 said you should completely change work environment
      * Unacceptable to require that of employer, would have to constantly give her new environment
      * QBSC 🡪 arbitrator
      * QBCA 🡪 arbitrator misunderstood the nature of Duty to Accommodate and really employer would have to show it is impossible to accommodate particular characteristics (wrong!)
      * **SCC** 🡪 rejected this and allowed employer’s appeal
      * **Talked about how purpose of DTA is not to completely alter the essence of the employment contract** (employee provides work in exchange for money)
      * Purpose of DTA is to ensure that employees who are otherwise be fit to work are not unfairly excluded if working conditions adjusted without undue hardship
      * **Employer doesn’t have to change working conditions fundamentally; has duty to make changes up to point of undue hardship**
      * Looked at what union expert said and they said here the **employer could meet test for undue hardship if characteristics of illness were such that proper operation of business were successfully hampered or employee unable to work for foreseeable future**
      * Upheld termination and found that in this case providing new work environment was undue hardship
  + **Accommodating Disabilities**
    - Duty to accommodate (disability)
    - Examples of accommodating employees with disabilities
    - Things employers consider:
      * Adding adaptive technologies to workplace
      * Changing physical landscape of the workplace (ramps, elevators)
      * Changing work schedules (reduced hours, part-time work)
      * Tolerating degree of absenteeism
      * Offering rehabilitation programs (drug and alcohol context)
        + When you are accommodating someone w drug and alcohol problem, relapse is part of the illness
      * Not required to create unnecessary job (but cases have talked about bundling duties – light duty work and other duties that could accommodate) [Bundling job duties]
      * Obligations for employers in Ontario under AODA (\*not part of this course) and Accessible Canada Act (much of it is not in force – goal to make federal industries accessible by 2040)
* **Workplace Investigations**
  + **Investigation**: Carry out a systemic inquiry to discover and examine the facts of an incident to establish the truth (Oxford Dictionary)
    - Key thing is looking at facts in systemic way to figure out what happened here and not for some particular purpose
    - **Doing an investigation is actually part of HR code to provide discrimination and harassment free workplace**
    - In terms of actual investigation, decision makers want to see reasoned search for truth not interrogations
  + **If employer becomes aware of workplace discrimination or harassment, then you have a positive obligation as an employer to conduct an investigation**
  + Harassment is not just a HR issue, since Bill 168 OHSA prohibits bullying as form of harassment and requirements to do investigation and sexual harassment with duties to do investigation
  + **Lots of cases in HR area where employer has been found liable for damages where they didn’t promptly and effectively conduct an investigation** 
    - Principles: fairness (making sure put specific allegation to respondent and giving them reasonable opportunity to respond before making decision), do investigation right (reasonable investigation)
    - If you are going to terminate someone, if no appropriate investigation, then liable for damages
  + In cases where investigations are flawed you can seek aggravated and punitive damages and damages for bad faith
  + You can even be liable **for poor investigation or retaliation *even if underlying claim of discrimination is not proven* (*Morgan*)**
  + **Workplace Investigations Gone Wrong**
    - Correia v Canac 2008
      * **If you hire a private investigator to conduct investigation, then private investigator can be liable for negligent workplace investigation**
      * FACTS:
      * Employer was 62 yrs old and worked for Canac for long time
      * Issues w theft and other criminal activities in one of the facilities
      * PI firm hired to work undercover in plant
      * Correia (wrongfully identified as employees engaged in theft and drug dealing) was accused of this and terminated for cause and then taken into room where police were waiting, arrests and held in custody briefly, 4 months later charges dropped because wrong guy
      * Somehow the PI had confused the employee who had actually engaged in activities with Correia even though latter was 40 years older
      * After charges were dropped Canac says want to come back to work? Correia says no and suffered psychological injuries 🡪 sued for wrongful dismissal and negligent investigation for company and investigation firm
      * PI moved successfully for summary judgement on the claim of negligent investigation (motions judge 🡪 private firm doesn’t owe him duty of care)
      * Appealed to CA
      * CA: allowed appeal in part; did an analysis and said that **because the way the private investigation firms hold themselves out, there is reason to extend tort liability to them**
      * Wouldn’t extend liability for negligent investigation to employer (in this case)
        + Can be held accountable in other ways
    - **Disotell**
      * **Failure to conduct proper investigation constituted constructive dismissal (even with appropriate policies – need to enforce them properly)**
      * FACTS:
      * P alleged harassment on basis of sexual orientation
      * Company sat on allegation and only did an investigation after guy went out on sick leave and got letter from his lawyer
      * Didn’t do good investigation, didn’t interview 4 alleged harassers just interviewed supervisors and didn’t interview witnesses who had been suggested
      * P had offered to meet with company to give them particulars and company said no
      * Sued for constructive dismissal on the grounds of harassment and claimed 24 months + punitive damages
      * HELD: company had not conducted serious investigation; failure to interview relevant parties and refused offer re: give details
      * Noted that they had great policies and programs but they weren’t being properly administered and people weren’t trained on them
      * Found that by doing this **poor investigation breached duty to provide discrimination and harassment free environment**
      * Got *damages equivalent to 12 months of salary*
    - **Elgert**
      * Worked for Home hardware for 17 years and was a supervisor when he was let go
      * One of the people he sued worked under Ps supervision
      * P had given Bernee negative performance review and moved her
      * Evidence was that she wasn’t happy with this because separated from BF
      * Bernee Complained to distribution centre manager that P had followed her into storage room and put his legs between hers (four months earlier)
      * Launched investigation into allegation of sexual harassment
      * **Chose bad investigator**: Person they picked to investigate had no training in investigations, dad’s friend, didn’t talk to appropriate witnesses, take written statements or look into background
      * P was called in and suspended; wasn’t told about particular allegations
      * At some point later, family members were told employer believed he was 100% guilty
      * Jury look at this and found employer had wrongfully dismissed him 🡪 **2 years pay in lieu of notice, $200,000 in aggravated damages and $300,000 in punitive (changed to $75k punitive on appeal)**
      * APPEAL 🡪 **punitive - $300,000 to $75,000**
      * **Investigation had been done in bad faith, misleading, unduly insensitive and unfair!!**
    - ***Morgan***
      * **you can still be liable as employer for poor investigation or retaliation** (retaliating because someone has made complaint) ***even if underlying claim of discrimination is not proven***
      * Morgan made claim of discrimination on basis of race that was not substantiated but way company investigated claim and behaved to him after the complaint caused them to be liable
      * COMMENTS: reinforces how important it is to conduct good investigation and ensure ppl aren’t engaging in any form of reprisal
* **Sexual Harassment**
  + ***Bill 132, Sexual Violence and Harassment Action Plan Act* 🡪** amended **OHSA to include sexual harassment** (strong internal responsibility – everyone has responsibility to create a safe workplace)
  + Code of practice put out by Ministry that gives you sample policies, talks about how Ministry will approach issues of investigation if they get a complaint
  + Under Bill 132
    - Companies required to have policies and programs that deal with harassment and sexual harassment and workplace violence
    - Reporting mechanisms in place
    - Requires employers not to act on just complaints but to act on incidents
    - Confidentiality 🡪 committee dealing with legislation realized that ppl not bring concerns in part due to confidentiality concerns so new legislation says in your policy you have to say that whatever information we derive from this investigation will not be disclosed unless it is necessary to do investigation, for taking corrective action or if required by law
    - Both complainant and respondent have to be informed in writing of the results of the investigation (*not same as report (confidential))* but need some explanation of conclusion
  + **Courts are expanding protections and remedies in sexual harassment and assault cases**
  + **Silvera v Olympia**, 2015 ONSC
    - FACTS:
    - Dealt with vulnerable P
    - Employer knew that P was single mother who had been abused as a child
    - terminated for allegedly being absent from work and not communicating about her absence
    - Brought action for damages for wrongful dismissal and alleged series of sexual assaults and sexual and racial harassment that was alleged to be done by her direct supervisor
    - Employer and direct supervisor didn’t actually defend the case (did not show) but because of that, court accepted factual allegations in Ps pleadings
    - In discussing **HR component** 🡪 **court pointed to violations of section 5(1) of the Code**
    - Race and sex discrimination
      * 5(2) 🡪 freedom from harassment 🡪 because of race
      * 7(2) 🡪 freedom from harassment from the workplace because of sex
      * Found violations of all 3 sections
    - Pointed out employer had no sexual harassment policies in place and no mechanisms for complainants or ways to address this
    - Not just procedural issue but impact on P was greater because there was no way for her internally to report this
    - REMEDIES: aggravated and general damages, punitive damages, costs of future therapy and future lost income 🡪 **$312,000**
    - Because employer was held vicariously liable for the acts of particular supervisor and particular supervisor was found liable personally, employer was jointly and severally liable for conduct and wrongful dismissal damages
  + **Doyle v Zochem** Inc, 2017 ONCA – **moral damages serve separate purpose than damages as a result of violation of human rights (manner in which person is dismissed)**
    - FACTS:
    - Woman who was repeatedly sexually harassed by co-worker and sues company after she was terminated
    - Got a number of different types of damages:
      * Wrongful dismissal
      * Moral damages - $60k
      * Violation of HRs - $25k
    - Worked for 9 years for this company and supervised all male group of refinery workers
    - Alleged harasser was plant maintenance manager and there was evidence that company thought this guy was irreplaceable because of his skills (see this in the past) which impacted the way he was treated
    - Plant maintenance manager and co-worker was told by company that P was about to be terminated
    - Meeting takes place; mean to her
    - Without knowing she was going to be terminated, made a complaint of sexual harassment
    - Company said don’t be so sensitive; need thicker skin
    - Did some cursory investigation and spoke to supervisor but then they didn’t take back what he said to the complainant
    - 5 days later terminated without cause
    - Psychological issues and goes on med
    - Trial 🡪 TJ found that she was wrongfully dismissed (CL reasonable notice) and said that the way she had been terminated justified an extra $60k in moral damages. Also awarded $25k under HR statute
    - Hadn’t fulfilled their obligation to investigate complaint; hurried and biased investigation that was insufficient
    - APPEAL
    - Company argued she wasn’t entitled to $20k in moral damages and that that amount subject to deduction for HR damages
    - **CA** 🡪 dismissed appeal
    - Damages awarded aren’t high enough or unusual enough to justify us getting involved
    - **Moral damages and code damages served distinct legal purpose**
    - **Moral damages** 🡪 awarded because manner of dismissal and **code damages** 🡪 violation of her right to be free of discrimination and harassment (remedial rather than punitive)
    - Also got costs on substantial indemnity basis because of the conduct of the company because they held appeal was actually a continuation of its oppressive conduct towards Doyle
* **Family Status Discrimination**
  + **EVERYTHING YOU NEED IS BELOW – NO NEED TO DIVE INTO CASES!!!!**
  + Definition: Status of being in a parent and child relationship (childcare and eldercare)
  + Generally, employee must only prove he or she was treated differently based on prohibited ground **OR** was treated the same without any recognition as to the prohibitive ground may have affected that person
  + Onus then shifts to employer for accommodation re: undue hardship
  + But these tests have not been consistently applied re: family status, that is why there is uncertainty
  + **Jurisdictions 🡪** DETERMINE WHICH TEST TO APPLY BASED ON JURISDICTION
    - BC 🡪 Campbell River test
    - Other places (+ federal) 🡪 Johnstone/Seeley test
    - **ON** 🡪 Acknowledge there are *two different tests* and show discussion you are aware of [Johnstone/Seeley] test and there is a suggestion that there is a deviation from this test [Misetich] [Peternal]
  + **Campbell River Test** (also applied in *Suen*) (BCCA)
    - **Campbell River TEST:**
    - **In order to establish discrimination based on family status you have to show 2 things:**
    - **(1) employer changed the term or condition of employment AND**
    - **(2) that change resulted in serious interference with a substantial parental or other family duty or obligation**
    - If 2 parts satisfied, then prima facie discrimination established
    - *Then onus shifts to employer*
  + **Johnstone / Seeley Test**
    - Court held that the Campbell River test was too restrictive
    - **4 PART TEST:**
    - **(1) have to show child is under your care or supervision**
    - **(2) child care obligation engages the individual’s legal responsibility for that child as opposed to a personal choice**
    - **(3) show that you have made reasonable efforts to meet childcare obligation through reasonable alternative solutions and there isn’t one**
      * Show neither they nor partners could meet obligations and available childcare services not reasonably available
    - **(4) whatever workplace rule is at issue has to interfere in a manner that is more than trivial or unsubstantial with the fulfillment of that childcare obligation**
  + **Misetich Test** (likely Ontario – but could be Johnstone / Seeley)
    - Made a new test (for all family status discrimination) consistent with the rest of prohibited grounds – and took more relaxed approach that you made reasonable efforts to self-accommodate
    - **employee has to establish a negative impact that would result in a *real disadvantage* to the parent-child relationship and responsibilities that flow from that relationship and/or to the employee’s work**
  + *Peternal* 🡪 ON court acknowledged the Johnstone Case and Value Village case not clarifying what test they applied but talked about both and concluding the company didn’t discriminate
  + **Eldercare** – *Devaney*
    - FACTS:
      * Employee had been absent to care for elder mother and company tolerated this for a while
      * Said to come back to office and eventually terminated him
      * Hadn’t actually asked for accommodation but company knew he was out for eldercare responsibilities
      * Found there was a breach of Code and found that even though there had been some problems caused by absence and moral issues, didn’t give this much weight and found there was a Code violation
    - APPLICATION (after reading case):
      * “in order to make out a *prima facie* case of discrimination on the basis of family status, the applicant must establish that the respondents’ attendance requirements had an adverse impact on the applicant because of absences that were ***required*** as a result of the applicant’s *responsibilities* as his mother’s primary caregiver”
      * ruled that the employer failed to demonstrate that its strict office attendance requirements for Mr. Devaney were reasonably necessary
      * The employer had an obligation to inquire into the caregiver responsibilities and explore what could be done to accommodate them, which the Tribunal held was not done
  + ***Campbell River*** (BCCA)
    - FACTS:
    - Woman working for Campbell river
    - 4 children, 13-year-old had serious medical and behavioural problems that required after school care
    - Company unilaterally Changed woman’s hours and woman made request to work hours she worked before – gave them letter from son’s doctor talking about care issues and 6 employees wrote letters of support
    - Met with Board to discuss issue and case but refused to grant request
    - Severe anxiety and panic attacks and didn’t come back to work
    - Union filed grievance alleging discrimination on the basis of family status stating that company had duty to accommodate hours so she was better able to care for son
    - Arbitrator 🡪 Campbell River – no discrimination based on family status and they had a right to change her hours because changed related to services to community
    - Appealed
    - CA 🡪 found there was discrimination based on family status
    - **Campbell River TEST:**
    - **In order to establish discrimination based on family status you have to show 2 things**
    - **(1) employer changed the term or condition of employment AND**
    - **(2) that change resulted in serious interference with a substantial parental or other family duty or obligation**
    - If 2 parts satisfied, then prima facie discrimination established
    - *Then onus shifts to employer*
    - APPLICATION:
    - Looked at psychiatric disorder and found that her needs with regard to her son in after school hours was an extremely important medical adjunct (key to medical well-being)
    - Concluded that **this was a substantial parental obligation**
    - Prima facie case was established and Meiorin test to be applied by Tribunal
  + ***Johnstone Facts*** (the analysis is under Seeley b/c same judge)
    - **Johnstone, 2014 FCA**
    - FACTS:
    - Johnstone and husband worked as border services officers and worked at Pearson
    - Required to work rotating and irregular shifts
    - When she came back from maternity/parental leave, Johnstone sought accommodation in form of fixed shift – one that would allow her to retain full-time employee status
    - Refused to grant request
    - Filed HR complaint
    - Rest of case explained below in Seeley – b/c same judge
  + ***Seeley*** (and Johnstone analysis)
    - FACTS:
    - Layoff from position of CN Rail (railway conductor)
    - Under collective agreement she could keep her seniority if she reported to work to cover shortages at CN’s request
    - Seeley lived in small town in AB, called on her to cover shortage in Vancouver
    - Accommodation she sought was to be relieved of obligation to cover shortage in this case because of child care issues
    - CN kept extending the date to report to work several times, but when she kept refusing terminated her employment and she commenced complaint
    - **HR TRIBUNAL**
    - Both employees discriminated against on the basis of family status and that CN failed to accommodate to point of undue hardship
    - JR
    - Applied reasonableness standard of review to tribunal’s decision on family status and to test of prima facie discrimination and found there were no errors so upheld them
    - **FCA**
    - Reviewable on standard of correctness:
      * A lot of intervenors including FEDCO (federally regulated employers organization) and court agreed with FEDCO and employers that the way family status had been interpreted and test for prima facie case in this context were questions of central of importance so were reviewable on a standard of correctness
    - Noted that judges and adjudicators who dealt with these kinds of complaints had been unanimous that **family status incorporates child care**
    - Held that TEST in Campbell River was too restrictive; created higher threshold to establish prima facie case of discrimination than for other types of PM discrimination
    - Said that we do feel there is a role for self-help in these particular circumstances
    - Taking those things into account
    - **4 PART TEST:**
      * **(1) have to show child is under your care or supervision**
      * **(2) child care obligation engages the individual’s legal responsibility for that child as opposed to a personal choice**
      * **(3) show that you have made reasonable efforts to meet childcare obligation through reasonable alternative solutions and there isn’t one**
        + Show neither they nor partners could meet obligations and available childcare services not reasonably available
      * **(4) whatever workplace rule is at issue has to interfere in a manner that is more than trivial or unsubstantial with the fulfillment of that childcare obligation**
    - APPLICATION:
    - Employees have met all 4 parts of test
    - **Johnstone**
      * Discussion about unsuccessful efforts to secure childcare
      * Didn’t have to deal with accommodation because didn’t raise it
    - **Seeley**
      * Company hadn’t give her enough info to allow her to make other arrangements
      * **Accommodation**: approach of giving her extended deadline wasn’t effective as accommodation; other individuals have been given accommodation of being recalled only to their hometown
    - **Misetich** 
      * *Said Johnstone test is the test to use for parent-child responsibilities but difficult to apply in elder care 🡪 MADE A NEW TEST (for all family status discrimination) consistent with the rest of prohibited grounds*
      * Said that applicants shouldn’t have to establish that their family obligation engages a legal responsibility
      * **Took more relaxed approach that you made reasonable effort to self-accommodate**
      * FACTS:
      * Women worked on schedule that had straight days
      * Injury on workplace
      * To accommodate physical restrictions company moved her to other position (shift work)
      * She wanted regular straight days because needed to be home to prepare dinner for elderly mother
      * Holding was that applicant had not established discrimination but tribunal indicated that it had intention to depart from Johnstone/Seeley case
      * Went back to principle that test for establishing discrimination should be consistent across grounds; family status should not be treated differently
      * Talked about how J/S case in childcare context is difficult to apply in elder care context
      * **New test (purportedly for all family status discrimination)**: **employee has to establish a negative impact that would result in a *real disadvantage* to the parent-child relationship and responsibilities that flow from that relationship** and/or to the employee’s work
      * Here applicant failed to establish this because couldn’t show that shift work some days impacted her ability to feed mother her evening meals
      * Weren’t comfortable with self-accommodation and said within context of making decision can consider other supports available but this is different than imposing a duty of self-accommodation
      * Felt employees cooperation in providing other alternatives is part of the accommodation analysis that would take place after prima facie case has been established

# Termination of Employment

* **Resignation**
  + Complete defence in a wrongful dismissal action
    - Employees who resign are not entitled to any damages in wrongful dismissal
  + If the defence is being raised, it is the employer’s onus to prove the resignation
  + **To be effective** in law, resignation must be given **“freely and voluntarily”** and if an employer raises resignation as a defence then employer must show that it is **“clear and unequivocal”** that employee resigned
    - **TEST**: Given all the circumstances, would a reasonable person have understood by the employee’s statement that he or she had just resigned?
      * It is an objective test
    - Resignation must be freely and voluntarily given; therefore if employer asks for resignation or pressures employee to resign, it is not a resignation but rather a termination
  + Examples of things found **NOT** to be clear and unequivocal
    - employee’s comment that he was going to start looking for a new job
    - Employee saying I do not wish to serve in my position anymore and look for new employment (both of these a future statement 🡪 no present intention to resign)
    - When employee says they want to resign in the heat of the moment (emotional moment) when they are
      * In order to tackle this: go back to them later and ask if they meant it
    - Silence from an employee
      * Employee works in a grocery store, cashier’s house catches on fire and she’s away from work for a few days, employer can’t reach her house phone, she hasn’t called in or ask how long she needs, employer assumes they’ve abandoned their job (which cannot happen legally 🡪 either resign or terminated with or without cause). They end her employment and say she resigned. She said there was no policy stating that she must call in. Silence can’t be clear and unequivocal intention to resign
  + If you think employee *abandoned* job, send letters and if she doesn’t respond, then you should terminate for just cause
    - Resignation shouldn’t be used because can’t prove clear and unequivocal
  + **When you terminate an employee who has already resigned**
    - Must ensure that you comply with their notice of
    - ***Oxman*** – employee quit with six months notice, employer terminated him as soon as he gave resignation and paid one months notice – employee sued for wrongful dismissal (more notice needed)
      * Employee approaches company and gives company six months notice of resignation
      * Says he is happy to work on transition matters
      * Employer accepts resignation but waives period of notice (no need for six months and you can go now)
      * Oxman brings wrongful dismissal action – if an offer of resignation is not accepted by employer on terms of offer, then it is not binding and employment hasn’t ended
      * Effectively Company terminated Mr Oxman and paid 1 months notice. Therefore entire analysis wrongful dismissal analysis and whether 1 months notice reasonable notice?
        + Court says it is not – owed six months
      * How to do it: you can pay the person the notice period in resignation and let them go immediately – that would be a valid resignation
        + Otherwise it may turn into a termination if employee rejects the resignation offer
* **Wrongful resignation** (*technically enforceable, but rarely enforced*)
  + Only thing that is “wrongful” in wrongful dismissal or resignation is that there was not enough notice provided
  + **Basic principle**: it is wrong for an employee to resign without giving the employer the notice period stated in a contract ***or*** if not in the contract, reasonable notice
  + Contract law
    - Written agreement entered into b/w employer and employee upon commencement of employment
    - A good contract should have a clause that says if you resign this is how much notice you must give us when resigning (2-4 weeks common)
    - If employee resigns and does not provide employer notice, it is a breach of contract and can be enforced
      * But practically it is rarely enforced
  + Common law
    - Applies if resignation notice period is ***not*** stated in contract
    - **Implied duty that you must give reasonable notice of resignation**
      * If not enough reasonable notice, then you can sue for breach of contract (it’s an implied term)
    - Some statutes have minimum resignation period but Ontario doesn’t
    - employer may increase resignation period in contract. No limit technically, but if too high then likely unconscionable
  + **Measure of damages** in wrongful resignation: cost to employer as a result of employee’s failure to give reasonable notice of resignation (***not*** the cost to employer of employee leaving the company) (***Systems Engineering***)
    - Wrongful dismissal measure of damages guiding principle: How long will it take employee to get a new job? (different measure)
  + ***Systems Engineering*** - Damages not measured based on what employer have received had they not resigned – damages measured based on employer losses incurred as a result of not providing sufficient notice
    - Employer suing former employee. Employer supplier of computer hardware. 2 employees resigned without any notice, started their own company, and employer claims this company created competition and they lost their customers.
    - Employer alleged that wrongful resignations caused financial loss of $175k
    - Employees claimed they had just cause to resign without notice b/c their employer made them work long hours and their personal and family lives were being destroyed
    - TJ disagrees w/ employee: no just cause; even though you worked long hours, you knew what you signed up for, not unduly harsh, etc.
    - Therefore issue: **What is reasonable notice?**
    - Held: one party should have given one week of notice and one should have given two weeks of notice
      * Now the difficult part is **measuring damages – not cost of leaving business entirely, but that they didn’t work the extra week/two weeks**
      * **At the end, employer gets total of $8k**
        + **Damages not measured based on what employer have received had they not resigned**
  + ***Blackberry*** – BB employee gave 8 weeks notice instead of 6 months in K – enforceable
    - Company sued former employee. Employee is long serve employee w/ company called QMS software which was bought by Blackberry in 2010 (he becomes an employee of blackberry). He becomes a vice president and soon after an executive vice president in 2013. Employer puts a clause in his employment contract for EVP that says you may resign as an employee from blackberry with *6 months* notice. You will continue to provide “active notice” unless notice period is waived by employer (employer will pay out either way).
    - He becomes unhappy and starts engaging with discussions with Apple. On Dec 23, 2013, gives resignation notice to BB of 8 weeks.
    - BB goes to **court to get declaration that K is enforceable** and therefore unless service period is waived, he can’t go to Apple
    - He says that it should be a wrongful resignation – says BB cannot prevent me from going to Apple (argues akin to slavery, non-competition covenant, etc.)
    - Court rejects all of his arguments and says that the **contract is enforceable**. He was **highly sophisticated**, agreed to it and knew the terms, etc. you are there until the deadline unless they waive the notice
  + ***Gagnon*** – salesperson does not give reasonable notice; held to be 2 months; losses are cost of him not closing deals during 2 months; not loss of forecasted sales generally
    - Difficult to determine dollar value of recovery (notice period is easy, money lost as a result is difficult)
    - Employee senior salesman, employee not happy and plans to transfer all of competition to competitor, competitor says if he does this they’ll hire him and his friend. Employees provide resignation effective immediately
    - At core of case is Gagnon claiming wrongful resignation, but Jesso claims unpaid fees by employer
    - Gagnon successful on wrongful resignation claim – at common law
      * **Issue**: How long it would replace Gagnon and what cost did they incur because he didn’t give the notice
      * Expert evidence says company did not get 20% forecasted sales increase due to him leaving – ***court rejects this***, **not proper measure. That is cost of him generally leaving**
      * Correct common law wrongful resignation notice period is two months
      * Measure of damages is **failure to give reasonable notice. How many sales did you lose as a result of him leaving two months early? $35k.**
    - But Gagnon also owes Jesso unpaid fees and company comes out with only $3k in fees
* **Termination for Just Cause**
  + *FRAMEWORK FOR THIS ANALYSIS: (1) TALK ABOUT GENERAL TEST BELOW, (2) TALK ABOUT IF IT’S SINGLE OR MULTI-INCIDENT, (3) RELATE TO CASES BELOW IN “TRENDS” WITH SPECIFIC FACTS*
  + Requires **fundamental breach** of the employment contract
  + Entitles employer to treat the contract as terminated
  + No obligation to provide notice or pay in lieu (***but*** recall: **ESA has “wilful” standard** – might be able to meet just cause standard but not wilful standard and hence must pay ESA termination/severance pay) (*Oosterbosch*)
  + Even where just cause is b/c alleged breach of criminal law, must prove it on a balance of probabilities – even where convicted (though easier)
  + If underlying allegation is fraud, courts will analyze those with **extra scrutiny**. But balance of probabilities is still there
  + ***McKinley – use the TEST!!***
    - Prior to this case unclear – Do you win based on that bad thing or based on the bad thing in totality of their employment and circumstances
    - Facts: dishonesty. Absence of work b/c high blood pressure. Wanted position w/ less responsibility (b/c of high blood pressure). Ultimately terminated employment. Tried to negotiate but to no avail. One of documents that is produced is a letter from a doctor stating that he can go back to position if he took certain medicine. They claimed he lied and they would have get terminated for cause if they knew b/c he lied.
    - Concept of **after-acquired cause** if you find out something later (see after)
    - Held: cannot treat all employees identically who engage in same misconduct
    - There is a **two-part test for just cause (use this!!)**
      * (1) does the evidence establish the employee’s misconduct on a balance of probabilities?
        + Did they actually do what is alleged?
      * (2) if so, must determine if the nature and degree of misconduct ***warrants*** a just cause termination
        + Must evaluate circumstances of misconduct, level of seriousness, extent to which it detrimentally affected employment relationship
        + There must be proportionality b/w severity of misconduct and sanction imposed
  + Categories of Just Cause
    - Single Incident
      * Did one thing and it’s really bad and we want to fire you for it
      * It must be really bad
      * How serious is what the person did, how prejudicial is it to the employer, what are the consequences for the employer, is there an insurmountable breach of trust now, what message is sent if you don’t fire someone for cause for this?
    - Multi Incident
      * Pattern of behaviour. E.g. pattern of being late, being disobedient, not wearing safety equipment, ongoing breach of policy, etc.
      * **Court will ask, did you engage in Progressive discipline**?
      * Warning letters, traffic light, etc.?
        + Employee given procedural fairness? Has employee been warned about misconduct? Have you been more serious with discipline progressively? Did you give them an opportunity to change their behaviour? Did you give them a **final warning** that their job is in jeopardy if they do it again? (this is a big one) (*Cain* – no clear final warning)
      * Condonation
        + If an employer fails to reasonably promptly discipline employee, you may be held to have condoned the employee’s conduct (and you can’t rely on it)
        + If the employer does an investigation, that’s okay, but if you just didn’t do anything then you might be held to condone it
  + After-acquired cause
    - Residual ability to rely on after-acquired cause in limited circumstances
      * Something happened during employment and employer didn’t know about it and could not have reasonably known about it before
      * Could be that something comes to light during litigation (or outside)
    - ***McKinley*** – during litigation they discovered that the employee was dishonest and amended lawsuit to include after-acquired cause
    - ***Van den Boogaard***
      * Facts: project manager for marine; laborious and safety sensitive work. Responsible for workplace safety and drug/alcohol testing
      * Employer terminates employee without cause and offers compensation. He declines and brings wrongful dismissal action. He gives his cell phone back. On his phone, they find texts during working hours seeking to procure drugs including to employee he supervises. Company claims that they did not know at the time they offered the package, and now they claim **after-acquired cause b/c project manager in a safety sensitive position procuring drugs** (discovered during litigation). Admits that he did this and does drugs during work. **Terminated for just cause.**
  + Trends in Just Cause Cases
    - Incompetence: *Bogden*
      * Very difficult to fire someone for incompetence now for just cause
      * Shows kinds of things court will ask employer
        + (1) did you communicate level of job performance that you require to your employee?
        + And were those standards reasonable? Can’t be a superhuman feat
        + (2) did you give suitable instruction to the person so they can meet the standard?
        + (3) can you show the employee was incapable of doing it?
        + Did you give employee fair opportunity to try after you coached them?
        + (4) did you give them a final written warning?
    - Insolence (insubordination): *Bravo*
      * Jerk to your boss, refuse legitimate requests from persons who are supposed to instruct you, etc.
      * Facts: P dismissed for cause b/c he stole company property – two little bowls. Used threatening language w/ supervisor. Admitted to it but it was a one time event
      * Held: stealing those two things and swearing at your boss ***not* enough** for 6 year employee with otherwise spotless record
    - Absenteeism / lateness – *Cain*
      * Can be just cause but must be take prompt and consistent action, send warning letters, etc.
      * Late 65 times and absent 36 times
      * Even though they spoke to her after every time, not enough b/c you didn’t give her a **clear final warning** and that is enough to fail
    - Intoxication
      * Assume no drug dependency – otherwise other things relevant – disability (Human rights code implications)
      * *Ritchie*
        + 10 years of service, inventory manager, drinks two beers. His manager saw him drinking but did not mention it. Got into a fight about the count. Inventory manager said he drank two beers so he should not operate forklift. When warehouse manager got the letter condemning it, they got into a fight and he got fired
        + Should have given him a better opportunity to stop drinking on the job – warn him and see if he does it again
        + No just cause
      * *Dziecielski*
        + 23 year employee, vice president, drove employer’s vehicles w/o permission after having had 4 drinks, coming back to work after customer visit, serious accident w/ serious injuries
        + Court held that this was not about intoxication, but rather **drunk driving on public highway in company vehicle – significant legal risk – just cause**
    - Assault
      * *Ditchburn*
        + Long term employee has a fist fight with customer of company
        + No just cause, not enough warning
    - Safety violations: *Plester*
      * b/c safety violations affect others too, it is treated differently
      * Employer supervisor in industrial facility, safety-sensitive position, 17 yr employee, failed to lock out a machine after working on it (safety measure). Company created 5 cardinal safety rules and one of them was lock out and tag out. Posted everywhere and told to report if you fail to follow protocol
      * Employee fails to do it and fails to report. His subordinates said he should have reported it and he tells them not to. He reported it after when employees already did
      * TJ: serious mistake ***but* not enough to fire with just cause b/c 17 year employee with otherwise spotless record**
      * CoA: upheld TJ
    - Sexual relationships in workplace – *Cavaliere*
      * Employee worked way up in company. In 1998 had sexual relationship w/ someone who reported to him. CEO personally orders him demoted and transferred to different location. In 2004 he engages in another sexual relationship with subordinate, but this time subordinate alleges it is non-consensual.
      * He is again demoted and transferred, this time he is given a letter stating that any future incidents are grounds for just cause.
      * 7 months later he engages in another sexual relationship with new immigrant employee eager to keep job. End up getting caught by woman’s husband who also works at the company
      * At this point they have investigation and order him not talk to anyone, but he arranges a meeting b/w woman and husband to pressure them to drop claim
      * This time it is held to be just cause – b/c of conduct ***but also*** while investigation was happening they tried to pressure them
  + “near cause” does not exist: *Dowling*
    - Near cause = If you engaged in misconduct that was not sufficient to arise to level of just cause for wrongful dismissal, then you owe less reasonable notice
    - No setoff b/c misconduct or crappy employee
      * Unless just cause
* **Wrongful Dismissal and Reasonable Notice**
  + Only thing that makes dismissal wrongful is that reasonable notice is not provided
    - Nothing to do with employer’s motivations
    - Requirement to give notice of dismissal when dismissing without cause
  + Critical thing court looks at (***measure of damages***): **how long will it take the employee to find a new job?**
  + Working notice vs pay in lieu of notice
    - Can give working (actual) notice or can give pay in lieu of notice
  + Termination notice (different from termination clause! This is when you terminate someone and give them notice of termination) must be **clear and unambiguous** (and must be clear on what date they are terminated)
    - generally speaking it is done in writing though no formal requirement)
  + **Onus is on the employer** to prove that what you paid is **sufficient** (reasonable)
  + Generally speaking time clock on when reasonable notice period starts to run is when employment is terminated
    - **Exception** is maternity leave: start running it from the end of their leave
  + **Determining reasonable notice – *Bardal* factors**
    - Weigh these factors and state whether each fact decreases or increases the notice period on the basis of these factors!!!
    - No one factor determines the notice period on their own *(DiThomaso (labourer but long term of service – can’t zero in on character of employment), Love (senior employee, short service shouldn’t supress all other factors))*
    - 4 factors:
    - (1) **character of the employment (position the person had)**
      * position itself, what level it is. The more senior the level of position, the larger length of reasonable notice
        + The more education required, the more senior the employee
        + The more plentiful the positions, the lower the level
      * No cap of 12 months CLRN for clerical/low level employees (*Cronk*, *DiThomaso*)
    - (2) **length of service with employer**
      * longer service with employer, longer notice period
        + *exception*: very short service employees (less than two years of service – typically get overcompensated)
      * courts should not overemphasize years of service when other factors push reasonable notice in another direction (*Love* – very senior employee)
      * court should consider time spent as dependent contractor prior to being an employee in this factor (*Cormier* – 13 years employee but 10 years dependent contractor prior – court considered 23 years of service)
    - (3) **age of the employee at the time of termination**
      * The older the employee, the longer the notice period
        + Generally: start thinking about it at 50, definitely 55, and absolutely at 60
        + End of mandatory retirement – can’t assume that people will retire, even if they are very old (in an effort to lower CLRN). Assume they keep working!
      * Especially relevant where person has offered evidence that they have been proactive in attempting to find employment without avail (*Kotecha*)
        + *Kotecha*: 68 years old. 21 years of service as machine operator
        + Leads evidence at trial that he applied to 200+ jobs, applied to employment agency, etc. and couldn’t get a job
        + Court awarded him with 22 months additional notice (24 months total)
    - (4) **availability of similar employment having regard to the experience, training, and qualifications of the employee**
      * always considered w/ employee’s training, credentials, etc.
      * courts tend not to focus too much on this factor until it is really relevant (P persistently applies to tons of jobs and can’t get anything)
      * Consider:
      * economic considerations (macro or industry or job specific)
        + If industry is not doing well, higher notice period
        + But likewise if industry is booming, can lower notice period
      * Alternatives in the region (e.g. in GTA lots of retail jobs, but maybe not in a small town)
    - Other Relevant Factors:
      * Inducement
        + If you go out and poached the person and then fire them soon thereafter – specifically where they were working in a job for a while and then they got poached but fired soon after
        + They may count some or all of those years of service of employment prior to working at the company
        + Typically after 3 years
        + Headhunters exist, they know about this – not really about that. It’s about a specific company poaching a person
      * Financial status of employer NOT RELEVANT!! (*Michela*)
        + Michela: Teachers in small school; TJ held P entitled to longer period but awarded shorter period; CA reversed, awarded full amount b/c financial circumstances of employer irrelevant
    - **Character of employment cases**
      * *Cronk* (no longer this 12 month supposed cap for clerical employees)
        + Used to be an assumption that for clerical employees there should be a cap of 12 months
        + CoA agreed with it
        + Clerical employee w/ 29 years of service, company restructured and terminated employment, 55 years old – even though there are these factors, non-managerial clerical employee has 12 months
      * *Minott*
        + Labourer 43 yrs old, 12 yrs of service
        + TJ awards 13 months of service
        + Key here is flexibility of factors, recession (factor 4), age, etc. Minott kind of reverses Cronk
        + Idea of cap set on lower positions of 12 months reasonable notice is gone
      * *DiThomaso*
        + 62 yr old mechanic, 33 yrs of service
        + TJ 21 months RN
        + CoA held reasonable range given the Barda factors
        + Minott is still good law
        + Inappropriate to zero into the character of employment (there are four factors after all)
    - **Length of service cases**
      * *Love*
        + Chartered accountant, senior VP, made $600k/yr and owned 2% of company, 2.5 yrs after hired employment is terminated w/o cause, brings an action for wrongful dismissal
        + TJ gives 5 months
        + CoA gives 9 months
        + While short service is undoubtably a factor that tends to reduce notice period, it cannot supress rest of factors (he was senior employee, etc.)
        + No one factor determines the notice period on its own!
      * *Cromier*
        + Consideration of what we tend to do with dependent contractor status
        + Fashion stylist becomes studio manager
        + Found to be a dependent contractor relationship w/ employer for 10 years, 1994 to 04
        + In 04 she is turned into an employee until 2017
        + Employment terminated w/o cause in 2017, wrongful dismissal action
        + She submits in her pleadings that court should consider his 23 yr service (including dependent contractor time)
        + Motions judge held that **her time spent as a dependent contractor for same employer should count when ultimately terminated later as an employee**
        + CoA agrees
    - **Age of employee at termination**
      * *Kotecha*
        + Notice period at issue
        + 68 yrs old, 21 yrs of service as machine operator in industrial biz, employer gives 2 months of working notice
        + Leads evidence at trial that he applied to 200+ jobs, applied to employment agency, etc. and couldn’t get a job
        + Court awards **22 months additional notice (2 months working notice still provided)**

Up to 24 months of notice total

* + Reasonable notice pain points
    - This is why employers should have employment contracts (and proper contractual provisions in the K): ***Cao***
      * Employee took position at accounting firm
      * Written agreement – 90 day probationary period – but did not state anything regarding termination during this period
      * 30 days into employment, told that employment is being terminated b/c not performing at required level, and b/c not completing designation by certain date
      * Court held **common law RN is 4 months** –Even though she worked for 30 days
    - why an employer should not change its mind: ***Buchanan***
      * Employee is offered employment, gives written employment offer
      * Start date week or two out. After he signed K but before he started work, employer changes mind and does not want to hire them anymore
      * *Employer purports to rescind the offer* (**but it’s been accepted**)
        + In the alternative, rely on probationary clause in K – no notice if terminated in 90 days
      * Court held employee terminated without cause, had a binding employment contract (is employee)
      * Can’t rescind offer after it is accepted
      * Probationary clause does not apply as well b/c he never started employment yet
      * **6 weeks CLRN for 0 service**
  + **Upper Limits on Reasonable Notice**
    - Generally speaking, 24 months is generally the limit the court will provide. However there are some decisions that award more, but tend to be exceptional
    - ***Lowndes***: Only exceptional circumstances will warrant a base notice period in excess of 24 months
    - *Dawe*
      * Employment terminated w/o cause, 62 yrs old, 37 years of service, at time of termination is a senior vice president
      * All Bardal factors weigh to a high notice period. TJ awards 30 months.
      * ONCA: reverse TJ, say 24 months should be given, not exceptional circumstances here.
        + Also criticize TJ for stating that society’s attitude changing, etc. without a trend in case law or an evidentiary record supporting it
  + **What Is Included In Reasonable Notice**
    - Reasonable notice calculated based on **what the employee would have received if his/her employee continued?** (*Pacquette*)
      * Salary, overtime, commissions
      * Benefits – health, dental, disability insurance, etc. Pecuniary value of benefits (how much would that have cost to you?)
      * Pension
      * Profit-sharing plans, LTIPs (bonus)
      * Stock options
      * Other perks (e.g. car allowance)
      * Bonuses – *Pacquette*
        + Employee terminated w/o cause
        + Issue: entitlement during CLRN to bonus plan?
        + K has provision stating employee must be “actively employed … on the date of the bonus payout”
        + ONCA Held:
        + Presumptively employee is entitled to compensation for all losses arising from the employer’s breach of contract in failing to give proper notice

As a result, employee would have received bonus where it is an integral part of their compensation package

Had he received 17 months of notice by way of working notice, he would have got the bonus

*Similar to termination clause, to K out you need express and particular language in bonus plan to limit it*

* + - * + Here: the employer did not make it clear. K says you have to be actively employed, **but did not go a step further to state that bonus will not count toward pay in lieu of notice**
  + How to analyze reasonable notice
    - How to analyze reasonable notice
    - Understand how to apply analytical framework to 4 Bardal factors
    - When you apply them to the facts, whether it will increase or decrease the range
    - But you can also reference specific cases and their fact
  + How to pay reasonable notice
    - Can be paid in three different ways, assuming you’re doing it as pay and not as advance notice
      * (1) Can pay it out in a lump sum equivalent to X months of compensation
      * (2) Can pay it by salary continuation (gone today but you will keep getting your biweekly payroll for the next six months)
      * (3) Or you can do a hybrid – rare
    - Lump sum vs salary continuous
      * Strategic decision
      * If we offer salary continuance, offer it for a longer period of time, or offer lower amount as a lump sum
      * Sometimes offer it as a settlement 18 months salary continuance or lump sum
      * CLRN is subject to mitigation – sometimes it weighs on the employer
      * Sometimes they pay salary continuance and bank on them getting a job, in which case payments stop
  + Employee has duty to mitigate damages – must attempt to find employment
* **Duty of Good Faith and Fair Dealing**
  + Framework:
    - **Implied term in K that employers will act in good faith in the *manner* of *dismissing* employee** (*Honda*) (method in which they are dismissed – not bad faith in reason for actually dismissing) (*Honda*, *Merrill Lynch*)
      * **at a minimum**, *in the course of dismissal* employers ought to be candid, reasonable, honest and forthright with their employees **and** should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive (*Wallace*)
      * duty of good faith NOT only during termination, also litigation tactics post-termination (*Ruston*)
      * **SPECIFIC CASES:**
      * Wallace: top salesperson every year, fired w/o explanation, later company says they had just cause to terminate him b/c of insubordination, night before trial changed argument to termination w/o cause. Had trouble finding a job due to having reputation damaged and had to declare bankruptcy/fell into depression – bad faith
      * Trask: Lied to employee about reasons for dismissal, knowingly wrongfully accused them of theft, ruined reputation in community – bad faith
      * Stolle: Employer withheld statutory termination pay to get them to sign severance – bad faith
      * Martin: Employer alleged just cause, abusing alcohol, etc. – bad faith
      * Birch: Firing employee while on vacation and ruining vacation – bad faith
      * Yanez: terminated w/o cause, *accidentally* paid less than ESA entitlements, when brought to their attention gave rest of ESA entitlements – not bad faith, genuine mistake
      * Honda: employer should not be faulted for relying on medical experts re absenteeism issue b/c of alleged disability (chronic fatigue)
      * Centra Windows: terminated for just cause initially but later dropped, withheld commission payment, etc. – not bad faith b/c principal issue was performance (for which they were fired)
      * Fox: terminated and told reason was budget cuts, but truth is supervisor did not like him, therefore bad faith (employer lying = bad faith), but no link to actual damages
      * Merrill Lynch: Honest belief, especially with arguable grounds, bars *Honda* damages for alleging cause. Employee terminated for just cause – some allegations true and others not entirely true, but it was made in good faith – no Honda damages
    - **Calculating damages** for breach of the term (*Honda*)
      * Where employee established that employer engaged in bad faith ***and*** where the breach ***caused*** actual damages, we will award damages that reflect the actual damages that someone suffered (*Honda*)
        + Must show what you suffered and link b/w conduct and damages (*Honda)*

specific: *Fox* – employee couldn’t establish that they suffered from depression, *Centra Windows* – employee couldn’t establish that withholding the commission payment resulted in any actual damages

* + - * Independent award of aggravated damages (These awards tend to be called “Moral damages” now) (*Honda*)
      * For mental distress, do not need comprehensive medical opinions of it (*Ruston*)
        + But compare to *Fox* where P did not lead *any* evidence of depression and thus failed to establish damages
    - ***Honda*** damages are limited to compensating loss, and are not punitive (*Honda*, *Merrill Lynch*)
      * However, for egregious conduct, court may award punitive damages (*Ruston* - $100k punitive damages due to empty allegations of fraud)
    - Honest belief, especially with arguable grounds, bars ***Honda*** damages for alleging cause (*Merrill Lynch*)
  + *HISTORY –* ***NOT IMPORTANT*** *JUST USE THE INFORMATION AND CASE SUMMARIES ABOVE*
  + In the past, there was a “duty of good faith and fair dealing” during termination which would extend the notice period if breached (*Wallace*)
    - This theory was rejected in Honda by SCC in 2008 – now it is an implied term in the K and when breached it is a separate category of damages – moral damages
    - But the test for what is a breach of good faith and fair dealing remains the same
  + *Honda v Keays*
    - Keays was working for Honda for 14 yrs in Alliston ON
    - Shortly after hired, he begins to suffer from chronic fatigue syndrome
    - Large amount of absenteeism
    - Takes disability leave – 2 years
    - He goes to evaluation by insurer – insurer says does not have a permanent disability and comes back to work
    - Only takes a month for absenteeism to go again
    - Honda gives him coaching letter (first disciplinary action) on basis that insurer does not have a medical disability
    - Keays says he cannot go back to work
    - Every time he is absent he must get a doctor’s note – that was the deal they made
    - Honda takes position under no obligation to deal with lawyer
    - All evidence shows that you do not have a medical disability
    - Hired 3rd party medical specialist and said you must go to accommodation appointment
    - He fails to show up (insubordination - fails to cooperate)
    - Keays gets 15 months CLRN
    - Gets an additional 9 months of Wallace damages for egregious bad faith conduct – 24 months total
    - ONCA: upholds trial decision
    - **SCC**: agrees 15 month CLRN but overturns Wallace award
    - This wasn’t egregious bad faith – relying on advice of
    - Did not have obligation to deal with lawyer directly absent litigation
    - Cannot be faulted for using medical experts
    - Should only give damages in
    - Just because something happens that upsets the person does not amount to bad faith
    - Analysis:
    - **Implied term in K that employers will act in good faith in the *manner* of dismissing employee** (method in which they are dismissed – not bad faith in reason for actually dismissing)
      * Scope of the duty still applies (the test is the same)
      * Just how you calculate the damages has changed
        + Independent award of aggravated damages (These awards tend to be called “Moral damages” now)
        + Where employee established that employer engaged in bad faith **and** where caused actual damages, we will award damages that reflect the actual damages that someone suffered
        + Must show what you suffered and link b/w conduct and damages
        + No need to deal with arbitrary extension of notice period
  + Moral damages pre-Keays
    - See the cases above in the framework – one liners
  + Moral damages post-Keays
    - Smith v Centra Windows
      * VP marketing development w/ 13.5 yrs service
      * Employer alleged just cause at time of termination, but later drops that
      * Brings wrongful dismissal claim
      * Terminated employment in attempt to stop him from redeeming shares
      * Company wrote termination letter designed to be intimidating
      * Company withheld prior commission payment (b/c of they were “inept”, not b/c of bad faith)
      * Held:
      * Key reason for firing was performance issues
      * Standard departure email
      * Lawyer termination letter was fine
      * Commission payment not withheld b/c of bad faith
      * And no actual damages that he suffered as a result of alleged bad faith
    - Fox
      * Company terminates P’s employment
      * In meeting, told employment terminated due to budget cuts that company must make
      * **Turns out that’s a lie, fired b/c supervisor doesn’t like him**
      * Do not have to tell him that, but you can’t lie
      * Held: reasons he was told he was being fired were false. **Action for bad faith**
      * Since Honda: any award must suffer actual damages
      * Employee alleging that he is suffering from depression – did not lead any evidence of it though. **Must lead evidence of damages and establish causation**
    - *Merrill Lynch*
      * Soost investment advisor, top performer, has **$1.6M book of biz**, age 41 w/ 3 yrs of service, terminated for just cause on basis that he did not follow investment dealing rules and failed to obtain approval for private placements
      * Gets new employment, but has lost most of his clients by that time
      * He sues for wrongful dismissal and wraps value of book of biz under moral damages
      * Claims loss of book of biz (actuarially valued at $1.6M) and loss of reputation
      * Totality of instances is NOT just cause – gets 12 months CLRN
        + Dismissed for cause insensitive, did not give him enough warnings, etc.
        + If he was terminated suddenly, employer knew he would have additional damages
        + TJ compensated for lost book of biz – $1.6M
      * **CoA**: 12 months CLRN correct; **overturns $1.6M award**
        + If $1.6M supposed to be tied to allegations for cause (bad faith), argument fails for this reason – b/c they were not in bad faith, some were and some weren’t, but on a balance didn’t amount to just cause – they had good faith and arguable grounds – does not amount to these damages
        + Also, they double-counted losses – b/c income earned from book of biz, and already counted income lost from that book – another problem
        + **If employee is woefully undercompensated – that does not matter**

*Employees often suffer damages greater than notice period*

**All we are concerned with is whether notice period is correct!!**

* + - * + Award was unreasonable based on all these reasons
    - *Ruston* – **duty of good faith NOT only during termination, also litigation tactics post-termination**
      * Breach of good faith and fair dealing specifically with litigation tactics
      * Worked for 11 yrs, starts as sales rep, ends up being president of company
      * Terminated for just cause – employer says he has committed fraud *but* **provides no details**
      * 54 by time of dismissal – **by trial still has not been able to find work**
      * He says he’s hiring a lawyer b/c negotiations breaking down, but then company’s lawyer says they will make this very hard for him. They will counterclaim ($1.7M unjust enrichment, fraud, breach of fiduciary duty, punitive damages, etc.)
      * Keddco failed to prove any of allegations – **counterclaim clearly a tactic to intimidate him**
      * Sufficiently tied to breach of good faith and fair dealing
      * ONCA: **19 months high based on Bardal factors**, but TJ was clear on why she set it there, considered 54 yrs old, small community w/ family ties, terminated for serious allegations all of which made it more difficult to get a new job
        + **Upholds $25k moral damages award**. **$100k punitive**. Supports TJs rationale and sets out reasons
        + Keddco failed to be candid 🡪 whether right or not they did not tell him about the fraud
        + They told him they’ll make life difficult etc.
        + 7 days into trial, reduced the value of counterclaim from $1.7M to $1 – clearly intimidation tactic
        + Keddco made personal attacks in pleading 🡪 not legal arguments
        + Made public unfounded allegations of fraud
        + He says he suffered mental distress – know that must show bad faith and a link to it. BUT You do **not** need comprehensive medical opinions of mental distress and that it’s proximate to what happened in employment. There is a loosening there!
* **Constructive Dismissal**
  + *FRAMEWORK FOR CD: (1) STATE CD TEST, (2) STATE WHICH BRANCH (1/2), (3) FIND SPECIFIC CASES RELEVANT BASED ON THE BRANCH AND THE FACTS LEADING TO CD*
  + “Constructive dismissal” = “constructive termination”
  + General principle: **employers entitled to restructure biz and workforce to meet biz realities. *BUT only up to certain point***
    - Implied term in employment K that employer won’t make substantial change so as to fundamentally breach employment K
  + **Constructive dismissal**: If an employer unilaterally makes a substantial change in the terms and conditions of employment, and that change amounts to **a fundamental breach of the employment contract**, the employee is permitted to treat him/herself as having been dismissed and the employer will be liable for damages (***SEE TEST BELOW***)
  + **Damages** are equivalent to the damages to which the employee would be entitled if he or she were dismissed by the employer without cause
    - CLRN or contractual – depending if termination clause exists
    - If you voluntarily quit your job, you are not entitled to damages (but constructive dismissal = not voluntary, it’s a termination)
  + **Constructive dismissal TEST**: (*Farber*):
    1. The employer acts unilaterally
    2. The employer makes a fundamental change to a term or condition of the employee’s contract of employment
       - Objective **test**: Would a reasonable person in the same situation as the employee have felt that the essential terms of the employment contract had been substantially changed?
    3. The employer acts without providing reasonable notice of that change to the employee (See *Wronko*)
    4. The employee does not agree to the change
       - Condonation as it applies to CD – doctrine of condonation
         * Condonation applies to CD similar to just cause
       - If your employer institutes changes and you don’t raise an objection soon, then you may be held to have condoned the change
       - But recall courts are inherently sympathetic to employees – give an employee reasonable time (grace period) to digest change and make objection
       - Timing depends. Months later? Condoned. week or two weeks? Did not condone.
    5. As a result of the change, the employee treats the employment contract as wrongfully terminated and leaves the employment relationship
  + Onus of proof to prove constructive dismissal is on **employee**
    - Balance of probabilities, as usual
    - Objective **test**: Would a reasonable person in the same situation as the employee have felt that the essential terms of the employment contract had been substantially changed?
  + Motivation of the employer is **not determinative** (their actions and the effect are what matters)
  + **Two Categories of Constructive Dismissal:** (*Potter*) [if you meet one of these, constructive dismissal established]
    - **Branch 1** – Has an express or implied term of the contract been breached and is that breach sufficiently serious to constitute dismissal?
      * Typically changes to an employee’s position, compensation or responsibilities
    - **Branch 2** – Does the employer’s conduct more generally show that it does not intend to be bound by the contract?
      * Typically changes to the work environment
  + *Potter*
    - Employee executive director of a legal aid clinic, 7 yr appointment, 4 yrs into appointment he is indefinitely suspended w/ pay w/o given reason for suspension. Says suspension is dismissal
    - SCC Held: **if you have not reserved the right, then a suspension in non-unionized environment is a constructive dismissal**
      * Biz justification for it? Nope
  + **Commencement of notice:** For most constructive dismissal, **the notice starts when the terms fundamentally change** (when *job change is communicated*).
    - Very small amount of CD cases where, in particular circumstances, notice period started running until later
    - Campbell
      * Notice should start when the ER did the thing amounting to CD
        + i.e. the day of breach. E.g. the day salary was cut in half etc.
    - Wallace
      * This is **rare**, but in some cases the effect of the change may not be clear right away – can count notice period when employee says they have been constructively dismissed
      * Delayed until employee has enough information to understand the meaning of the change and that it amounts to CD (*i.e. to see the effect of the changes that were implemented)*
  + **Changes to an employee’s position, compensation, or responsibilities**
    - **Demotions**
      * Generally constructive dismissal
      * People have investment in title, compensation, responsibilities, etc.
    - **Changing or reassigning job duties/responsibilities**
      * e.g. instead of doing them across the whole store, you are assigned particular department. But can be more substantive such as demoting a general counsel to the mail room
      * *Ally*
        + Employee who held two hats – 50% b/w two roles – director of education, director of school of accountancy. Split equally b/w them
        + Employer separates the roles b/c of job performance. He carries on as direct of education. His subordinate is direct of school of accountancy
        + Ends up leaving and suing for constructive dismissal
        + He was not necessarily demoted (still had directors title), his compensation was kept the same, ***but he lost half of his responsibilities*** (that’s a constructive dismissal)
      * *Maasland*
        + M is professional engineer, works in traffic services group in city of Toronto. Starts as software programmer but 10 yrs later becomes senior systems engineer.
        + City does review of organizational structure – says they have key IT roles in two different units. City decides to consolidate units into one
        + Her co-worker will lead the unit. She will move into consolidate unit and report to him
        + Keep wages the same, title same, work location same, ***BUT*** moving into consolidating unit, reporting to someone who used to be her peer, she doesn’t know exactly what she’ll be doing ***and*** told She doesn’t have any other choices
        + She brings constructive dismissal action. No job description for prev role and this one. But witnesses testify
        + City should not be faulted for seeking efficiencies
        + This person went for operational role to administrative role
        + This was a substantial change
        + The city characterizes her as unwilling to change, but this perspective does not account for the job change
        + Awarded CLRN of 26 months
      * *Ocean Nutrition*
        + Matthews worked for Ocean Nutrition for 14 years. Various titles. VP of new and emerging technologies. Company had long term incentive plan where executives receive significant bonus where company is sold or gets giant funding
        + New COO is hired, created giant plot to force Matthews out of company

Freezing Matthews out of meetings, not allowing him to do his job to open up a plant in time, when he does open it up, does not invite him to plant opening

Towards end, Matthews only has 1-2 hrs per day of work b/c COO takes away his jobs

* + - * + He resigns soon after
        + 13 months after Matthews resigns and leaves, triggering events under LTIP happened and everyone gets massive bonuses
        + TJ: Matthews entitled to 15 months CLRN. Within which triggering events
        + In addition to wages, $1.085M in damages b/c of bonus
        + CA: **no question he has been constructively dismissed – 15 months still stands**
        + But not entitled to bonus b/c of limiting language in K regarding bonus
        + Note: strong dissent: should have been duty of honesty implied into contractual agreement – akin to Bhasin – not yet implied to employment Ks

Parties must not lie or knowingly mislead each other re performance of K. would not impose duty of loyalty to employee or duty of disclosure. It would be a simple requirement not to lie or mislead re contract performance

Cannot envision that on basis of lies and deceit engineer lies to out Matthews

* + - **Changing reporting status**
      * For most employees, does not come up often. E.g. boss fired, report to new boss. Companies reorganization.
      * Kinds of claims like Ally successful usually though – suddenly reporting to your subordinate
      * Typically when people are quite senior
    - **Reducing or changing employee’s hours of work**
      * Sometimes independent, sometimes w/ other changes – usually more than one arguable change
      * Remember, think if it’s a fundamental breach of employment contract?
      * E.g. 10-15 min change not fundamental, but if you worked days and you are asked to work nights, that could be fundamental
    - **Reducing the employee’s salary**
      * Serious reduction is likely a constructive dismissal
      * General rules of thumb
        + If changing by 15% of more, then constructive dismissal
        + 5-7% or less probably not
        + In that space in b/w, difficult to analyze
    - **Loss/cancellation of a benefit/bonus plan that is part of the employment contract**
      * Similar to salary 🡪 e.g. change health care coverage significantly, can be a unilateral change
    - **Geographic transfer**
      * If you move people around all the time, it’s okay usually 🡪 if it’s part of their role (e.g. wind turbine installers installing them all over the country)
      * Comparing to what it was before
      * But if you usually work out of one location and you ask them to move to other side of country
    - **Imposing suspension**
      * Basic rule: ***Crascallan***:
        + suspensions happens all the time in unionized. But does not happen in general employment law. We are talking about disciplinary suspensions
        + **If you have not created that right as an employer (contract or policy that people are aware of), disciplinary suspension is akin to constructive dismissal)**
        + Suspension is constructive dismissal. If you want to prove otherwise, must be able to point to an express term of K or in theory an implied term
      * *Trites*
        + Employer initiated temporary layoff. Legislative process in ESA
        + Said this is a suspension so CD (which is the law)
        + TJ: here there is a statute that allows for process, so how could it be CD? No CD
        + ***NOT FOLLOWED MUCH***
      * *Filice*
        + Security supervisor, employer operates casinos. AOGO commences lost and found logs. Thinks there’s been theft.
        + Advise complex that employee under investigation re workplace. Place under unpaid suspension (the moment you aren’t paying them, it is disciplinary)
        + Ultimately charged with theft under $5k and charges are dismissed
        + He surrenders gaming registration b/c of charges
        + He gets fired b/c surrenders gaming registration
        + TJ awards 17 months CLRN
        + Employer appeals – **CA agrees constructively dismissed, changes CLRN 7 months**
        + They had a handbook. They had properly incorporated to contract. They said they had the right to suspend him. ***But not to suspend him without pay***

Therefore must state that suspension is justified – think back to Potter

* + - * + ***Allegations were still being investigated*** – unilateral change to employment relationship w/o properly constructed right
  + **Change in work environment** (brank 2)
    - *Shah*
      * Supervisor treats employee in a manner that is unreasonable, authoritarian, impatient and intolerant
      * Employer’s conduct creates a hostile and embarrassing work environment for the employee
      * NOTES on it:
      * Shah successful career, well-regard, 12 yrs service, big bonuses, and then he got a new supervisor. New supervisor gives poor performance reviews that are unsubstantiated and within short time, given a warning letter. When he goes back to supervisor to ask why bad performance reviews and warning letters, he refuses to answer and issues him a new warning letter for coming re warning letter #1
      * He *puts him on “probation” but there isn’t such a thing*
      * Resigns and claims constructive dismissal
      * Possible to find that someone constructively dismissed **where employer’s treatment of employee makes employment intolerable**
      * Objective test – **what reasonable person would find to be intolerable**
        + On any objective standard, here it is intolerable to receive unsubstantiated poor performances reviews, etc.
    - *Colwell*
      * Works for property management company for 7 years
      * Goes into office and **finds secret camera that her boss installed in her office**
      * Supervisor says they put camera in b/c some maintenance staff stealing from us. Not spying on you
      * She doesn’t believe this; has camera removed; has to receive medical attention b/c she’s disturbed about camera
      * Held: Constructive dismissal along line of branch 2
        + Even though there is not a right of privacy under legislation at the time of case, **having this camera installed and unreasonable expectation, this is a work environment that is irreparably destroyed**
  + **Duty to mitigate** – *Mifsud*
    - Whether mitigation is achieved by staying in alternate position or looking for alternate work
      * But sometimes it is reasonable not to take alternate position to mitigate if there is irreparable harm, humiliation, assault, etc. in the workplace
        + But must still look for a new position
    - **Factors when looking at reasonableness of mitigation offer: (see page 80 too)**
      * Relationship b/w employee and employer (would it be reasonable for employee to stay?) – irreparable harm to relationship?
      * State of the job market and probability of employee obtaining alternate employment
      * Impact of mitigation offer for future permanent employment
      * Employer’s offer and motive for that offer
    - Mifsud: promoted from foreman to supervisor but employer not happy w/ performances, so reassigned back to foreman position. Salary stayed the same but position involved shift work and reduced responsibility and had less of a chance of promotion
    - Started work in new position but later after a few days and started action for constructive dismissal
    - Key issue: transfer to new position may constitute constructive dismissal but does not relieve employee of obligation to look at new position and evaluate it as a way of mitigating damages
    - Where salary offered is the same, where working conditions are not substantially different and work isn’t demeaning, and where personal relationships are not acrimonious, it is reasonable for employee to accept position in the meantime or until he/she finds employment elsewhere
    - If employer can show that employee should have accepted reasonable mitigation offer, even though there has been a fundamental breach, employee will be found to not have mitigated damages
    - But again remember the power imbalance 🡪 courts hesitant
    - Since they only have to act reasonably, if relationship irreparably damaged, then employee not expected to accept mitigation offer but must still mitigate by looking for alternate employment
  + **Attempts at avoiding constructive dismissal** – Wronko (**giving advanced notice of changes**)
    - When amending must give notice that if employee does not accept, then employment terminated. Make it clear. If terminated, must give proper notice (can be working notice) and then may offer re-employment
    - Wronko employed by employer for 7 yrs when promoted to VP in 2000. at time of promotion, negotiated employment K which provided him w/ 24 months of notice or pay in lieu of notice if terminated w/o cause
    - In 2002, company hired new president and wants to amend Wronko’s employment K. sent wronko new employment K with new termination clause which reduced W’s termination clause form 24 months to 2 weeks
    - W refused to sign and insisted original K was in place
    - President sent a letter giving him 2 years advanced notice of this change
    - W continued to work and he never agreed to the termination clause (he actually refused the change)
    - After 2 years, President sent W the new K and says if you don’t accept, then you won’t have a job
    - Took position that he was terminated and brought wrongful dismissal claim
    - TJ: entitled to unliterally amend K upon giving reasonable notice which it had. It was W that had ended employment relationship when refused to report to work (resigning). Entitled to 0
    - CA: reversed trial. Original K that remained in place. Held that employer is not legally entitled to give an employee an ultimatum to accept new contractual terms
    - **Employee** has **3 options** when presented w/ employer’s offer to amend his/her employment K:
      * (1) employee can accept change in terms of employment (employment continued under new terms)
      * (2) employee can reject change *and* if the employer persists in treating relationship as subject to the new term then the employee can sue for constructive dismissal
      * (3) employee to make clear that they are rejected the new term but continue to work.
        + If you choose third option, then employer has two options:
        + (1) employer can allow employee to keep working, in which case old term applies, OR
        + (2) employer can terminate employee w/ proper notice and offer re-employment on the new terms
    - In W when employer gave advanced notice, refusal to accept offer. The employer condoned his refusal which meant that terms of original K remained in force. At the end of 2 year notice period, employer’s ultimatum was when notice of termination occurred
  + **Suing for constructive dismissal – *Russo* –** you can sue your employment for constructive dismissal while still working for them for the purposes of mitigation
    - Employer having financial difficulties. Reduced pay of all employees. Russo is a warehouse manager. 57 yr old, 37 yrs old. Got a 50% cut to total comp. sued for CD and filed motion for summary judgment
    - Kept working for employer during this time but mad it clear through his lawyer that he was not accepting changes and continuing to work only to mitigate
    - Can employee sue for CD while still working for employer?
    - Motion: not heard until 17 months into employment. Agreed that there was a CD. Issue was his continued employment. Employer argued he condoned by working. he clearly articulated that did not accept / condone changes
    - **He was mitigating his loss by conduct and no reason why he couldn’t sue**
    - No different than Mifsud

# Employment Litigation, punitive damages, MITIGATION

* Summary judgment motions, small claims/simplified procedure 🡪 SEE NOTES. ONLY THE ESSENTIALS ARE COVERED HERE
* Summary judgment motions
  + ***TEST****: Hryniak*: There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment (Rule 20.04 RCP).  This will be the case when the process (**TEST**): (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
  + TJ should first determine if there is a genuine issue requiring trial based only on the evidence before her, ***without*** using the new fact-finding powers
* Settlement issues and issue with releases
  + Titus
    - P lawyer worked in house for 18 months. Offered settlement 2 weeks pay plus 2 and half months – offer conditional on signing release
    - He signed it on the spot even after he was told to think about it and sign it later
    - Release had language saying it’s voluntary, etc. releases them of all claims
    - In real life, want to give minimum of 7 days – want to avoid duress claim
    - He got a new job within 2 weeks but didn’t get paid as much
    - Sued former employer for wrongful dismissal – said it was unconscionable, undue influence, etc.
    - TJ: found in P’s favour and awarded 10 months of RN
    - ONCA: reversed TJ. **3 month offer was fair b/c avoid uncertainty of litigation, could have negotiated, b/c he was a lawyer, absence of legal advice was not an issue** (though P argued particularly vulnerable b/c financial difficulties but court said they wouldn’t rule in his favour b/c he was a senior lawyer)
  + *Remedy Drug Store*
    - **When making an informal settlement or agreement, make that informal agreement conditional upon creation of written document**
      * State case won’t actually settle until you’ve formalized and signed a written document
    - Importance of clarity of terms when dealing with settlement in release
    - On employee’s last day, deleted 14k emails from inbox
    - Company started action on breach of fiduciary duty, etc.
    - Parties attempted to settle dispute before injunction heard
    - Series of emails b/w them and president of drug store
    - Discussion re how the parties can capture and destroy documents
    - President said he would only agree with IT firm that was hired by Remedy’s lawyer
    - Disagreement re the agreement they reached
    - Company suggested IT work involved confidential searches
    - No where was there an exchange of her full sweep of email accounts. While full sweep was company’s IT firm intended on doing, did not document it
    - Upheld settlement agreement that included basic IT sweep (Farnham’s advantage – not the version that Remedy was going for
* **Punitive Damages**
  + Not compensatory – meant to punish defendants for “harsh, vindictive, reprehensible and malicious conduct” (*Vorvis*)
    - punitive damages only awarded if conduct up to the breach creates an independent actionable wrong (*Vorvis*)
      * An “actionable wrong” does not require an independent tort, such that a breach of the contractual duty of good faith, or breach of a distinct and separate contractual provision, or other duty such as a fiduciary obligation can qualify as an independent wrong
      * Independent actionable wrong could be the breach of its implied contractual duty of good faith and fair dealing (*Galea*)
    - *Keays*: P should not have received punitive damages b/c it is reserved for exceptional cases where employer’s conduct was **malicious, egregious, and outrageous conduct**
      * *Keays*: Chronic fatigue syndrome case – concerned re absenteeism and content of doctor’s notes. Refused to see employer’s occupational therapist, terminated. No independent wrong sufficient to meet this standard
  + Three basic key principles (*Vorvis*):
    - (1) award of punitive damages is an exception to the general rule that damages are designed to compensate the injured
    - (2) punitive damages should not be restricted to tort actions or governmental abuse of power. They should also be awarded in contracts cases but rarely and with discretion
    - (3) may only be used in circumstances where conduct giving rise to cause for complaint is of such nature that it merits punishment
    - *Vorvis*: Lawyer in house let go after 7 yrs, 2 yrs before dismissal new supervisor hired, concluded that P took too long to get work done, supervisor set up weekly productivity meetings, degenerated into form of inquisition, ultimately caused P to resort to medical attention
      * Held: conduct doesn’t rise to level of harness necessary for punitive damages
  + Cases w/ high amounts
    - *Pate*: Accused of theft. Employer told him to either sign release or they’ll call the cops. They called the police, he was charged and went through a 10 day trial (was acquitted). Employer withholds exculpatory evidence from police (only gives inculpatory evidence). **$450k punitive damages**
    - *Boucher*: assistant manager at Walmart refused request to falsify logs by her supervisor; was then repeatedly humiliated and harassed by supervisor. Got award of $100k punitive damages and $200k aggravated damages (for breach of duty of fair dealing during dismissal)
      * To obtain an award of punitive damages, **a plaintiff must meet two basic requirements.** 
        + **(1) The plaintiff must show that the defendant's conduct is reprehensible**: in the words of Binnie J. in *Whiten*, "malicious, oppressive and high-handed" and "a marked departure from ordinary standards of decent behaviour"
        + **(2) The plaintiff must show that a punitive damages award, when added to any compensatory award, is rationally required** to punish the defendant and to meet the objectives of retribution, deterrence and denunciation
      * ***When* the claim against the defendant is for breach of contract, as is P’s claim against Wal-Mart, the plaintiff must meet a third requirement.**
        + **(3) The plaintiff must show that the defendant committed an actionable wrong independent of the underlying claim for damages for breach of contract.**
    - *Galea*: executive employee at Walmart. Gets restructured to India/Brazil with fewer responsibilities and declines it (demotion). Gets terminated. Stopped reasonable notice payments 11 months in (K said 2 years). Treated her with disrespect and “Set her up to fail”. **Punitive damage award of $500k**
      * Size of company can be relevant to punitive damage award
* **Mitigation**
  + Under common law: **Employee must take reasonable steps to mitigate his/her damages in a wrongful dismissal case**
    - Any salary or benefits you obtained during notice period will be deducted from reasonable notice period – b/c meant to compensate while looking for a job
    - **Mitigation does not apply to ESA termination pay and severance pay**
      * **You get that whether or not you get another job**
      * **Statutory entitlement**
  + Failure to mitigate:
    - TWO WAYS:
    - (1) if employee does not take adequate steps, OR
    - (2) if employee does not accept reasonable offers of employment (see remaining with the employer below)
  + *Employer* has the burden of proof (*Michaels*)
  + ***Employer must prove that P could reasonably have avoided some part of the losses claimed* (*Michaels*)**
    - P shows that they made some reasonable efforts in response employer’s claim and D’s burden that P hasn’t done very much, lots of jobs out there, etc. (*Michaels*)
  + **Two** parts employer needs to prove: (*Michaels*)
    - (1) fail to take reasonable steps
    - (2) ***if*** they took those reasonable steps, they ***likely*** would have obtained similar employment
  + If a job is **substantially inferior** to the position the employee held, the court may not count it (*Brake*)
  + Where employee regularly holds two jobs, will not deduct income from second job as mitigation (*Brake*)
  + Grace period 🡪 **2-3 months** where they’re not expected to be setting up interviews and applying for jobs
    - Figure out what next steps are, etc.
    - 2-3 months off = not failed to take reasonable steps by employee
  + **What are reasonable steps:**
    - Employee has grade period
    - Employee may need to take slightly different job; **however**, courts have consistently found that they’re ***not*** required to accept a job that is lower in “prestige” or significantly different in nature
      * But sometimes reasonableness duty requires them to take another job that is not in their field exactly
    - Also consider:
    - State of industry / economy generally
    - Personal circumstances
    - Policy considerations
    - Fixed-term contract
  + **Effect of a contractual notice provision on mitigation:**
    - ***Bowes*: If employment agreement specifies amount of notice that employee will receive upon termination and is also silent on duty to mitigate, the employee is NOT required to mitigate unless specifically mentioned in agreement**
      * Mitigation only applies if you haven’t agreed in advance and where employee is seeking common law reasonable notice
    - *Bowes*: Bowes Ks with Goss, 6 months notice or pay in lieu if terminated w/o cause. Nothing in the K that says he must mitigate. Held: did not need to mitigate
  + **Remaining with the employer**
    - ***Evans***: Factors that should be considered whether an employee should be required to stay with an employer
      * History + nature of employment
      * Whether or not employee had commenced litigation
      * Whether offer of re-employment made while employee still working or only after employee had left
      * Employee should not be obligated to mitigate by working in an atmosphere of hostility, embarrassment or humiliation
    - Need to mitigate so long as work wasn’t demeaning, salary was similar, relationships weren’t acrimonious, etc. (*Evans*)
      * Evans: Evans willingness to return to work under certain conditions, no evidence of acrimony, relationship not seriously damaged, upheld CA
    - *Farwell*: ER must offer clear opportunity to work out the notice period *after* the employee alleges constructive dismissal (in order to mitigate)
  + **Things to do to mitigate**
    - **Starting a business**
      * In many cases, can mitigate by starting his/her own business
      * If there is lots of opportunity in his/her field, a court can find that starting a business is unreasonable
      * E.g. if you are an IT professional, you are offered many jobs, but instead you decide to start a job-walking business – probably unreasonable
    - **Change in career**
      * Some cases hold it is reasonable for employee to change career in relation mitigation
      * This is especially the case where there is an economic downturn and it is difficult to find a job in their field
    - **Obligation to move/commute:**
      * **Many cases that have held that employee does not need to move out of their local area**
        + **Exception: nature of industry requires customary moving – e.g. mining**
      * Do not need to break family ties and move to a distant area in order to mitigate
      * Can be within a reasonably limited geographical area
    - **Higher paying new employment – employer get credit? Conflicting cases.**
      * Does that higher income apply to reduce damages that former employer is required to pay? Does employer get benefit of situation where they are earning money
      * Conflicting cases
        + (1) where P in wrongful dismissal gets higher paying job as mitigation within notice period, entire amount that they earn from job during notice period gets reduction (credit for the higher paying income)
        + (2) once there is a higher paying job, damages stop and employer does NOT get credit for the higher paying income
  + **If a job is substantially inferior to the position the employee held, the court may not count it (*Brake*)**
  + **Having 2 jobs**
    - Brake:
      * Restaurant manager at McDonald’s (also had job at Sobeys at same time). Good record until one bad performance review. transferred to location that was noteworthy for poor performance. Soon placed on 90 day progressive discipline program. Offered demotion (which would be humiliating to her) but refused it and sued for constructive dismissal (termination)
      * She got another job that was substantially inferior at home depot in the meantime
      * **Re mitigation:**
      * Reasonable not to go to work as assistant manager b/c it would have been humiliating
        + reasonable person in her position not expected to take that demotion
      * Home depot position was **substantially inferior** to position that she held with manager, so do not have to count it
      * Did not give employer credit re sobeys b/c she had always worked sobeys job
  + *Gent*: was reasonable to come back to work
    - Employee laid off w/o contractual provision; hired lawyer; was told he could come back
    - Employee did not and argued that it was humiliating to come back to work, etc.
    - Court held that employer’s offer was reasonable in the circumstances
      * Gent himself said he enjoyed working there, good company, etc., offer letter was vague but he was open to ask them questions (as state din letter), no reprisal for contacting lawyer, can extend start date, does not affect his legal claim, etc.
  + Effect of failure to mitigate: gets deducted from reasonable notice

# Restrictive Covenants

* **GENERAL RULE**: Restrictive covenants are a restraint of trade and are *prima facie* unenforceable and void
  + Courts will not enforce restrictive covenants unless they are reasonable
* Onus of proof on **employer**
* Restraint must be **reasonable** in reference to the parties concerned and the interests of the public (*JG Collins*)
  + **TEST**: (*JG Collins*)
    - **(1) employer must demonstrate that they are protecting a legitimate proprietary interest**
      * Traditionally, “legitimate proprietary interest” is (1) trade secrets and confidential information and (2) connections to customers/goodwill
      * (1) trade secrets and confidential information
        + E.g. secret processes/formulas, other types of confidential information that provides an opportunity for competitive advantage compared to competitors who do not know/use this
        + If information is general, generic about industry then that is not information that you have legitimate proprietary interest
        + If employee was not exposed to that trade secret in course of employment, then it will fail
      * (2) connections to customers/goodwill
        + Employers can have legitimate interest in trade connection/goodwill, but do not necessarily have a proprietary right to customers
        + Courts look at whether former employee’s skill, reputation, etc. attracted those clients, and whether employee’s influence is due to employer
      * In order to determine if employer’s interest is “legitimate”, courts will look at: **(1) nature and extent of business of employer, (2) character of work of employee (what employee was doing)**
    - **(2) restraint must be reasonable between parties in terms of:**
      * Temporal length
        + Some authority that suggests that 2 years is the outside limit of restrictive covenant – but you see restrictive covenants far shorter than that in many instances
      * Geographic area restricted
        + Spatial area covered
        + Consider: Business, location of employee, nature of where employee worked
        + E.g. not reasonable to make restraint area Ontario where employer only valid in Peterborough
        + **Must be precisely defined AND appropriately limited (for all of them)**
        + Where there is a plan to expand but not expanded yet, not reasonable area to seek prohibition
      * Nature of the prohibited activities
        + Narrowly and unambiguously drafted- again
        + Court will not enforce a restrictive covenant if it tries to prohibit more than necessary to protect that interest
        + **Courts will not enforce non-compete where lesser non-solicitation clause would suffice (*Lyons*)**
        + When you read the covenant as an employee, do you know exactly what you should not be doing? Courts look at that narrowly
      * Overall fairness
        + What were reasonable expectations of parties when they made the K?
        + Quantum of consideration is relevant in determining whether restraint is reasonable
        + Even though courts will generally not look at adequate consideration
  + **(3) must be reasonable in terms of the public interest**
    - Sherk
      * Doctor with RC that said not to practice any type of medicine for 5 years within 5 miles of st catherines
      * Held this is against the public interest
      * Public interest: having widest medical care for residents of Ontario; shortage of obstetricians in St catherines area – thus Contrary to public interest
* **Distinction b/w covenants in biz agreements and covenants in employment agreements** (*JG Collins*)
* **If clause is not reasonable, courts will not read it down to make it enforceable**
  + *Shafron*: “metropolitan area of Vancouver” had no legal meaning; it is ambiguous. Therefore the RC is unenforceable
  + *Tiny exception*: Blue‑pencil severance, removing part of a contractual provision, may “be resorted to sparingly and *only in cases* where the part being removed is *clearly* severable, trivial and not part of the main purport of the restrictive covenant” (*Shafron*)
    - Different from notional severance which reads down a clause (rewrites it) to make it enforceable
* **Enforceability**
  + Generally now, 2 years is the limit for restrictive covenants (other cases that had enforceable higher limits are old cases)
  + *JG Collins:*
    - D sold biz to insurance company, was working for them, non-compete for 5 yrs in the Niagara falls region and liquidated sum of $1k in total for breach
    - Left agency and started own biz, poached 50% of clients, etc. was sued
    - Covenant was not contrary to public interest – b/c 22 general insurance agents in area, no indication that people in Niagara falls area would suffer is Elsley not in insurance biz
    - Collins not entitled to both injunction AND liquidated damages – that would be double recovery in their opinion. Had to elect – fixed sum of $1k OR injunction (if chose injunction – then could recovery for actual loss up to date of injunction but again limited to $1k b/c of liquidated damages clause)
  + *Lyons*
    - K contained RC: non-compete 3 yrs, 5 miles
    - Multari (dentist) worked for 5 months, gave proper notice and left practice
    - Then started an oral surgery practice a few miles away from P’s property
    - Had a legitimate interest in retaining clients and customary referrals
      * But not referrals
    - **Legitimate interest in protecting own referrals could have been protected through a non solicitation clause (and this was not exceptional case), so covenant was struck**
  + Martin
    - **Temporal limit in practice could be unlimited – therefore it is not reasonable and not enforceable, even though Martin was sophisticated and received independent legal advice**
    - 20 yr employee, minority share in employer’s biz, assets of biz sold and martin got $1M in cash and other entitlements including indirect interest in company that was the purchaser. As part of the whole deal, he signed employment agreement with employer
    - It contained non-compete and non-solicitation clauses
    - RC would end 24 months after disposal of all shares – but they were conditioned on third parties approval (and no contract regarding forcing them to approve – not even a requirement for them to act reasonably)
      * “because it depends on any required consents of third parties, is therefore for an indeterminate period” – there is no fixed outside limit
* **How to increase chances of enforceability**
  + At time of signing – give employee time to read it and suggest that they get independent legal advice
  + During employment – provide consideration (B/c changing terms of employment); e.g. term of promotion, part of getting a bonus, etc.
  + At the time of termination – if already existing RC that you think is enforceable, state in separation package that employee acknowledges it and that they acknowledge it remains in force and binding. Also at time of termination, if issue went to court, look at conduct of employer. Make every effort to act in good faith, be fair, etc.
    - Often relationship b/w amount of pay providing them and length of restrictive covenant (particularly senior employees)
  + REMEMBER: DO NOT USE BOILERPLATE CLAUSES (can start w/ them though)
    - Must consider nature of biz and nature of employee’s work
* **Enforcing RC / Getting Relief**
  + (1) injunction, and/or (2) damages
  + Injunction test: (*RJR*)
    - (1) Does employer have a strong prima facie case (Reasonable and enforceable, employee breached, etc.)
    - (2) Would employer suffer irreparable harm?
      * Any damages it might get in legal action wouldn’t adequately compensate them for the breach
      * Where most applicants fail
    - (3) Would balance of convenience favour granting the injunction?
      * Employer does not only have to show that injunction required to protect their interests, but also that injunction is not unfair to employee (employee would be capable of earning a living without breaching the agreement)
* ***Creative restriction*** – instead of restrictive covenant, can have a covenant for compensation (*Rhebergen*)
  + Employee veterinarian worked in clinic. b/c high cost involved in training employee, agreed there would be a **compensation clause** in the employment agreement
  + Clause would be triggered (on slide) if employee set up a competing biz in 3 yrs that she left
  + It does not prohibit competing – just provides an amount if she sets up a practice at various times
  + 14 months after employment left and started biz, went to court to seek declaration that it’s unenforceable
  + CA HELD: yes, restraint of trade (agreed), **but** disagreed on TJ that it was a penalty. Clause that provided compensation for costs of training employee. Held not ambiguous. Reasonable and enforceable against employee
    - There was evidence that supported the amount of money they spent on the employee’s training, etc. and were merely seeking to obtain compensation – not punitive in nature and well evidenced

# Torts in Employment Law

* **Vicarious liability**: Employer’s responsibility for tortious conduct of the employee if authorized or within scope of employment – No fault on employer’s end required
  + **TEST**: **An employer is liable for torts it (1) authorizes OR (2) which otherwise occur in the scope of the employment of its employees (*Bazley*** – cite bazley for the rest of this list below**)**
    - Where conduct of employee closely tied to risk that employee’s enterprise created, employer can justly be held liable
      * Inquiry is **not** directed at foreseeability of risks of specific conduct ***but*** **foreseeability of broad risks** associated with whole enterprise
      * Enterprise not only have to provide locale or opportunity to commit wrong, but must **materially enhance risk** in order to hold employer vicariously liable
    - Just b/c tort takes place during working hours or on the job is not by itself enough to determine vicarious liability
    - Also not determinative of employee is acting outside the scope of their *authority*
      * If still within the scope of *employment* can still be vicarious liability
        + Even when improper or unauthorized way of working – can still be liable – e.g. theft that occurs during scope of employment
  + Torts within the scope of employment
    - *Bazley*:
      * Non-profit operates care facilities for children; invited Curry to work who was a pedophile, Curry abused child, after investigation Bazley promptly fired and criminally convicted. Held: non-profit is liable – “opportunity for intimate private control and parental relationship that were required under terms of employment created a special environment that brought to fruition sexual abuse”
    - *Theile*: Employee negligent in leaving unattended delivery truck unlocked and permitted theft of a parcel
    - *Strilchic*: Taxi driver negligently allowed drunk off duty colleague to drive cab
  + Torts outside the scope of employment
    - *Barrett*: Steward on ship posing as passenger steward assaulted passenger in a room
    - Court discussed how assault was unconnected to employment, separate from employment
* **Negligent misrepresentation**
  + **Elements**: (*Cognos*)
    1. Duty of care based on a “special relationship”
    2. A representation that is untrue, inaccurate or misleading
    3. Representor acted negligently in making the representation
    4. Representee must have reasonably relied on the representation
    5. Reliance was detrimental to the representee – damages resulted
  + *Cognos*:
    - had stable job in Calgary, interviewed for job in Ottawa, told that he was being hired for major project, but withheld info that it was contingent on receiving funding. After he moved, was terminated shortly after. Sued for negligence misrep (omission)
    - their subsequent employment K had no terms limiting tort liability
* **Assault and battery**
  + *Ayotte*: Bell account manager after missing sales objectives was humiliated and embarrassed, and after confronting boss, was physically pushed. Successfully sued for assault/battery
* **Negligent infliction of mental distress (nervous shock)**
  + *Ayotte*: *negligent* infliction of mental distress is ***not available in the employment context***
    - Only **intentional** infliction of mental distress is available in the employment context!
      * *Sulz*: The plaintiff must establish that the D engaged in outrageous or flagrant and extreme conduct that was calculated to produce an effect of the kind that was produced
      * *Ayotte*: This is a **high standard** to meet. Bell manager humiliates worker for not meeting targets, swears at her, physically pushes her, etc. not found to be intentional
      * *Sulz*: again reaffirming high standard. Woman gets new supervisor who indulged in harassment including swearing, derogatory comments, rumors, prohibition of contact with other officers. Not found intentional, only negligent
  + But remember that human rights legislation still provides for compensation – this is an alternative that can sometimes lead to larger damage awards
* **Defamation and defence of qualified privilege** (and defence of justification)
  + **Defamation**: plaintiff must prove that the (1) words were defamatory and that they were (2) published
    - Imputed words were defamatory: words would lower his reputation to the average
      * Words are defamatory if they are false and tend to discredit the plaintiff by exciting adverse opinions and feelings of other persons
    - The words were published – communicated to at least 1 other person other than P
  + **Defence of qualified privilege**: statement that is published on an occasion when there is a duty to make that statement or there is a common interest or mutual concern b/w the parties – e.g. during a reference check
    - the statement must have been made without malice to the P
    - Cannot succeed where statements were made with knowledge that it was false or an honest belief of their trust (*Downham*)
  + **Defence of justification**: statement is true
  + *Downham*: employee terminated w/o cause for misjudgment (though not wrongdoing). President gave bad reference and was sued for defamation among other things. He was successful in defamation – statements were false, qualified privilege did not apply as he was reckless in his investigation and as to whether statements were true
  + *Papp*: negative but honestly given reference did ***not*** constitute defamation
    - After 3-4 months of job searching, first ranked candidate and checked references. When president was contacted and asked questions, he basically said P had performance and attitude issues, did not get along with his co workers, etc.
    - Defence of qualified privilege applied: Qualified privilege applied. Genuinely believed what he did about P and did not act recklessly
  + *Chiang*: allegations of sexual misconduct that were unfounded by employer; sued for defamation. Defence of qualified privilege does not apply b/c it was made w/ malice
* **Inducing breach of contract**
  + **Elements**:
    1. Valid, enforceable employment contract
    2. Awareness by the defendant of the existence of the contract
    3. A breach of the contract procured by the defendant or some serious interference of the contract
    4. Breach was the effect of wrongful interference by the defendant
    5. Plaintiff suffered damages as a result
* **Intentional interference with economic relations:**
  + **Elements**:
    1. An intention to injure the plaintiff
    2. Interference with another’s method of gaining his/her living or business by unlawful means
    3. Economic loss to the plaintiff as a result
* ***Drouillard***: inducing breach of contract / intentional interference with economic relations
  + P worked for cable company for 15 yrs, left to work in US and then came back and got a job with a new company, Mastec who’s #1 client was the cable company
  + When he showed up on first day, he was terminated – was told that reps of other company did not want him working on their property
  + Inducing breach of contract
    - Liable – knew of the contract, did not have any adverse consequences
    - Even though they did not state you have to fire this guy, b/c of cable company’s dominance in the area, it effectively meant he was fired
      * There was substantial certainty that their conduct would result in a breach (aka his termination)
  + Intentional interference with economic relations
    - Not liable – even though company did not follow *internal* policy, that is not enough to establish second element of “unlawful means”
* **NO tort of harassment in Ontario: *Merrifield***
  + **But note that human rights legislation remedies are available!!**
  + And intentional infliction of mental distress available in employment context of course

# Occupational Health and Safety

* **Application – s 3 OHSA:**
  + 3(1) does not apply to work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence
    - e.g. you
  + 3(2) Does not apply to farming operations
  + 3(3) does not apply to teachers (they have other similar legislation)
  + 3(4) doesn’t apply to government legislation
  + 3(5) limited application to those self-employed
    - Subsection 25 (1), clauses 26 (1) (c), (e), (f) and (g), subsection 33 (1) and sections 37, 38, 39, 40, 41, 51, 52, 54, 57, 59, 60, 61, 62, 66, 67, 68 and 69, and the regulations in relation thereto, apply with necessary modifications to a self-employed person.
  + *Wyssen*: **Applies** to the “employer” of an independent contractor (the party who hires contracts the independent contractor)
    - Services provided through contractors and subcontractors
    - respondent is window cleaner (individual who has their own biz), entered into K to clean 4 windows, 1 of the buildings too big, contracts C to clean the window who uses own equipment, not supervised by respondent who hires him, rope that he was holding onto breaks and he falls to his death
    - Respondent is charged with OHSA b/c he is his “employer” – not in compliance with OHSA
* **Legal Duties Under OHSA**
  + Employers – ss. 25, 26 (more onerous duties under OHSA)
    - s25(2)(h) – **Paramount duty is to provide a safe workplace: employer shall take every precaution reasonable in the circumstances for the protection of a worker**
    - Then it breaks down into particulars
    - Responsible to provide workers with equipment and maintain it in good condition
    - Employers responsible that any protective equipment is **used *as prescribed*** (e.g. employees that need to wear gloves, employer must make sure they’re wearing it and wearing it properly)
    - Provide information, instruction, and supervision to protect the health and safety of the worker (training requirement and supervising requirement)
    - Employer has an obligation to appoint a competent person to be a supervisor
    - Duty to acquaint workers with any hazards in the work (point hazard out to workers)
    - Employer has obligation to post full copy of OHSA in the workplace both in English and the majority restaurant
  + Supervisors – s. 27
    - S 1(1) Defines a supervisor as “person who has charge of a workplace or authority over a worker” – quite broad
    - *Bartram*: senior officer, not a front-line supervisor, supervises over 400 employees, still found to be a supervisor of a maintenance crew because he had “charge or authority over workers”
    - Again **overarching duty** “take every precaution reasonable in the circumstances for the protection of a worker.” – s 27(2)(c)
    - Obligation to ensure worker wears protective devices, equipment, and clothing properly
    - Obligation to tell workers of any hazard that the supervisor is aware of
  + Workers – s. 28
    - Core is worker must work in compliance with provisions in OHSA
    - Worker must use all protective equipment that employer requires them to wear
    - E.g. worker can be charged if they don’t wear a harness they are required to wear
    - Worker has a duty to report to their supervisor or employer any contravention of the OHSA or the existence of any hazard of which he/she knows
    - No horseplay in the workplace
    - Worker shall not engage in any prank, contest, feat of strength, unnecessary running or rough and boisterous conduct.
  + Owners – s. 29
  + Project Owners – s. 30
  + Suppliers – s. 31
    - Those who give materials, machinery, or devices to companies
    - Must ensure that the machine, device, tool or equipment is in good condition
    - If a safety device / equipment malfunctions, they can be charged
  + Certain Professionals – s. 31(2)
    - For architects and engineers: if their advice or certification is made negligently or incompetently and a worker is endangered, they can be charged in their own capacity
  + Corporate directors and officers – s. 32
    - Must take reasonable care to ensure corporation complies with OHSA and regulations
    - In most companies, health and safety team reports up to directors/officers
* **Criminal Negligence**
  + **Statutory Framework**
    - 217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a **legal duty** to take ***reasonable steps*** to prevent bodily harm to that person, or any other person, arising from that work or task.
    - 219 (1) Every one is criminally negligent who
      * (a) in doing anything, or
      * (b) in *omitting to do anything that it is his duty* to do,
    - shows wanton or reckless disregard for the lives or safety of other persons.
    - 220 causing death by criminal negligence
      * Life imprisonment
    - 221 causing bodily harm by criminal negligence
      * Up to 10 years imprisonment
    - Corporate liability – s 22.1
  + **Cases**
    - Fantini
      * Cave in of trench during construction process
      * Cannot enter trench unless it has a 45 degree slope (to prevent collapse)
      * Workers who enter into a trench must wear protective head and foot gear
      * Fantini has 25 yrs experience (clean record) (his own company), charged with OHSA when his worker is killed
      * Company charged with criminal negligence causing death and various OHSA
      * Plea deal – if he plead guilty to OHSA he dropped criminal negligence
      * Ended up paying a **fine of $50k**
    - Transpave
      * 23 yr old employee, trying to clear jam in machine (paving company), went into machine to clear jam, machine cycled and he was killed
      * Machine had safety mechanisms on it to prevent this from happening (light curtain – if beam of light broken if someone is in there, it stops)
      * But guarding system was actually unplugged – as a result he was killed
      * Found that transpave had no written work procedures on how to clear a jam
        + Employee had not been trained on how to clear a jam
        + **Worst part – member of transpave management had noticed that guarding system was disactivated that day and did nothing**
      * Criminal charges laid
      * Transpave pleads guilty
      * Sentencing: **$110k fine** for transpave, court said *small company, nothing like this had happened before, transpave right after it spent $500k to upgrade it to European safety standards* (**higher than Canadian standards**)
    - Metron
      * Christmas eve in 2009, 6 workers working on construction project in Toronto, get on swing stage
      * 4 workers that don’t have lifelines and fall to the ground and die
      * 5th worker who is working a lifeline but it malfunctions – he is paralyzed
      * 6th worker is wearing a lifeline and properly attached and walks away physically unharmed
      * **Metron**: enters a guilty plea to criminal negligence charge
      * Senior officer charged – He permitted them all to get onto swing stage and knew there wasn’t enough lifelines, knew that exceeds weight capacity, knew that they were doing drugs
      * Director also charged in personal capacity – fine of $90k
      * *Sentencing*:
      * seriousness of offence is shown by the punishment (life imprisonment, unlimited fine for corporations)
      * You should think of economic viability of a company, but do not let it pervade the analysis
      * The prospect of bankruptcy may be appropriate
      * **$750k fine**
    - *Kazenelson* (**leading case**) – the same incident of Metron but this is the project manager charged with criminal negligence causing death (above the direct supervisor)
      * Project manager on construction site that Metron was involved in (not supervisor – Fazeloff, he was)
      * He was also charged in individual capacity – in charge of entire project and hired Fazeloff
      * Pleaded not guilty and went through a full trial
      * Findings: knew that 6 workers were working on balcony, knew he was working on swing stage from floor to floor, knew he would use swing stage, ***Fazelloff (direct supervisor) asked about lifelines and he said not to worry***. **Does nothing about having not enough safety harnesses**
      * His offence was arguably worse b/c he was also a teacher for an industry association
      * His failure to act was not a momentary lapse, not a situation with a supervisor who does not know a risk, rather knew the risk and took a chance – resulted in death of 4 people
      * Sentence: **3 ½ years in prison**
    - *Campbell* – **Crown cannot wait until OHSA charges are dealt with to charge the accused with criminal negligence – unfairness to accused and infringes upon accused’s constitutional rights**
      * facts: Campbell operates boom truck (truck with crane) and toppled over and killed another worker. Happened b/c boom truck driver didn’t extend stabilizer
      * Ministry of labour investigated but so did police
      * Charged with OHSA – charged as supervisor – pleaded guilty and paid $3500
      * **5 months after pleading guilty to OHSA charge and 2 yrs after accident, police charge him with criminal negligence causing death**
      * Some suggestion in case that charges may have been laid b/c not happy with low penalty under OHSA
      * Campbell argues delay in laying criminal charges highly prejudicial to him
      * **Court agrees with him – not reasonable for Crown to wait until OHSA charges were done. Charges could have proceeded at the same time**
      * Took away security of any legal strategy
      * Interfered with s 7/11 charter rights
      * About the how and when charges are brought forward 🡪 but you can face both, they just need to charge them within proximity – don’t wait until after guilty plea under OHSA to charge the worker
* **Joint Health and Safety Committees – s 9**
  + **Role of JHSC**
  + **When JHSC Required + Composition**
    - Any workplace that has regularly 20 or more workers
    - Must be at least **4 members** if 50+ employees
    - At least 2 members if <50 employees
    - Workers must be at least **50%** of the committee
    - Workers must be selected by the WORKERS themselves
      * Employer can’t just select any random worker
    - Must meet at least once every 3 months
    - Must have a full record if inspector shows up and wants to inspect records
    - Requirement in OHSA – employer must comply w/ joint H+S committee
  + **S 9(18) – duties in meetings and examples**
    - Situations that may be hazardous to workers
    - Making recommendations to employer for how to improve H+S
    - Committee can insist on inspecting workplace once a month
  + **9(12) – Certified Members**
    - At least one worker rep and management rep must be certified
    - Can investigate claims
    - Entitled to institute **workplace stoppages** if unsafe
    - 9(13) doesn’t apply to workplaces with fewer than 50 workers
* **Work Refusals – s 42**
  + statutory right to refuse work that they believe to be unsafe
  + certain exemptions – categories of employees who don’t have this right
    - e.g. police, firefighters, medical personnel, etc.
  + **Two stages**
  + **First stage** – *test*: a worker may refuse to perform work if he/she has reason to believe the work is unsafe (**subjective** – belief of the worker)
    - Danger must arise from workplace (condition, machine, etc.)
    - Worker must promptly report this to their employer/supervisor
    - Supervisor/employer must investigate situation *immediately* in presence of worker and either someone representing the worker or member of safety committee, or some other knowledgeable worker selected by the worker themselves
    - Worker required to stay on site during time of investigation and must be paid for time during investigation
  + **Second stage** – where ministry of labour is involved – **objective standard** – *test*: Would an average, reasonable worker with a good knowledge of workplace have reasonable grounds to believe the work is unsafe?
    - Occurs when it is not resolved at the first stage – if after investigation employer says it’s safe and worker disagrees
    - If inspector finds that work is safe, worker must either continue to do work or refuse and face discipline
* **Employer Reprisals – s 50**
  + Employer **cannot** penalize, discipline, dismiss, suspend (etc) a worker for acting in compliance with or seeking to use the protection of the *OHSA* – s.50
  + Workers alleging employer reprisals can file a complaint with the Ontario Labour Relations Board
  + **Reverse onus**: employer must establish that it DID NOT act contrary to s.50
  + *DiFalco* – **even if decision is *partially* motivated by the reprisal, employer liable**
    - Employer construction company and concerned about productivity level of employee, at the same time employee asked 5 electricians to put on hardhats. Some did but others didn’t
    - He told foreman (supervisor) and foreman said that based on the area of house they are working on they did not need to. Worker got mad and started yelling at him about the decision
    - Employer makes a decision to terminate employment (1) for productivity issues already having, and (2) insubordination toward foreman
    - **Employee brings s 50 reprisal complaint**
    - Alleges it is due to his enforcement of safety rights
    - Employer must prove it did not ac tin that manner – not persuaded by employer’s arguments. Even though employer had legitimate pre-existing concerns, it was motivated at least a little bit by OHSA complaints. If even a bit of your decision was motivated by prohibited reason, it is enough to taint the entire decision
    - **Default remedy: reinstate worker but worker didn’t want it – so looked at financial compensation instead**
* **Duty to Report Accidents**
  + S 51 OHSA: If a “**person”** has been critically injured or killed, the employer must immediately **notify** the inspector, the JHSC and the union, if one exists
    - Not just a worker! Any person, but note qualification below (but when worker, always need to report it – this test is for persons other than workers)
    - *Blue Mountain*: **Must be a reasonable nexus b/w hazard giving rise to the injury and realistic risk of worker safety in order to make the incident reportable**
      * Person dies in unattended swimming pool in blue mountain resort, MOL charges them based on failure to report. Employer argues that person is too broad and would include a notification anytime a person dies, COA agrees
  + Within 48 hours, must submit a written report to the Ministry of Labour about what happened
* **Enforcement – health and safety inspectors**
  + Two levels: (1) lower level of inspection and issuing orders, ensuring compliance, etc., (2) charging persons with offences committed
  + **S 54: duties and powers of MOL inspectors**
  + **Workplace inspections**
    - Allowed to carry out workplace inspections to ensure compliance with OHSA and ensure that IRS is working
    - They can inspect workplace at anytime without warrant
      * E.g. work refusal, stoppage, “blitz”, etc.
    - Ask questions of any party at a workplace
    - They can conduct tests of equipment or material
    - Require production of documents, licence, etc.
    - Require employer to carry out safety examination by engineer at their expense
    - Requires employer to fix guard, etc.
    - Issue work stoppages
      * Can issue a work stoppage for specific equipment or if rampant in workplace for the entire workplace until issues are fixed
    - S 62(2): **everyone person shall use all necessary means to facilitate inspector**
      * 62(1) Cannot obstruct inspector
  + If you receive an order, obligated to post order in workplace where it will come to attention of employees and must give employee to joint H+S committee
  + Employer’s notice of compliance
    - Submit notice to MOL and joint H+S committee must sign off on it to – resolves the issue
    - Must post it on the board with notice
  + **Appealing an order** – s 61
    - If it’s wrong, if it’s unsafe to do what inspector told them to do, etc.
    - 30 days to appeal
      * Appeal to Ontario labour relations board
        + Have all powers of inspector
        + Consider the matters anew (de novo)
      * Sometimes may apply to have an order stayed pending appeal
* **Enforcement – OHSA Offences – s 66**
  + **Offence – s 66**
  + **Strict liability offences** – *Sault Ste Marie*
    - prosecution must prove actus reus beyond a reasonable doubt but then burden shifts to the defendant to mount a defence (on a balance of probabilities)
    - **Defences:**
      * #1 Mistaken set of facts: accused reasonably believe in a mistaken set of facts which if true render the act/omission innocent
        + ***London Excavators***

LE is subcontractor, involved in construction site, told by general contractor that the areas are free of any “services” (e.g. electricity, water, etc.) – claimed they did a “locate”

LE digging and hit concrete – went to general contractor and they said it was fine, just an old nursing home, keep digging. Eventually hit hydro (dangerous). Charged

Argued reasonable belief in mistaken set of facts – based on what general contractor told them

Court held that it was reasonable initially, but it was not reasonable once they hit the concrete (should have known that general contractor was providing them with misinformation

* + - * + ***Bartram***:

Arises b/w of competing construction measures happening by 2 different crews at the same point

1- crew cleaning tunnel walls (northbound)

2- clearing asbestos (southbound)

Asbestos when it’s stuck in one place it’s fine, but when it moves it’s not. You must turn off ventilation

Northbound people have exposure to fumes (carbon monoxide exposure) because of lack of ventilation

TTC had something similar happen in 2004. TTC management thought they put plans to address it (portable fans, etc.)

Laid charges against Bartram – senior officer, not front line supervisor, supervises 400 employees

Mistaken set of facts defence:

b/c of what happened in 2004 – reasonably believed that this workplace hazard had been adequately addressed through portable fans, etc. and had no knowledge or reason to believe that measures were not in place in this case

* + - * #2 Due diligence: accused took all reasonable steps to avoid the event in question
        + ***Bartram***:

See facts above

Due diligence defence successful:

Bartram did have a system in place to address the hazard, workers had right to refuse work and that was *constantly communicated* to them, active joint H+S committee that had been actively disciplining people for not complying with similar offences (taking active steps to enforce their policies), Bartram had practice of personally going through tunnels once a month

* + - * “officially induced error”: ministry themselves told you something was wrong
      * Also has procedural defences (as opposed to substantive defence) – e.g. right to trial within reasonable time (e.g. *Campbell*)
  + **Enforcement Process**
    - Ontario *Provincial Offences Act* contains procedure
      * Prosecution commences by laying an Information
      * Accused will be served with a summons
      * Accused has right to disclosure (access all evidence against them)
    - “laying an Information”
      * MOL goes before the court – usually inspector
      * Statement under oath that he/she has reasonable and probable grounds that an offence has been committed
      * Summons is delivered to the accused
    - Trials
      * typically heard by justice of the peace unless the Crown wants it to be heard by the judge
    - Appeals
      * Can appeal by right to judge of Ontario court
      * Another appeal by leave to ONCA
* **Fines and Penalties**
  + Individuals – up to $100,000 ***per count*** and/or imprisonment up to 12 months
  + Corporations – up to $1,500,000 per count
  + Fines over $1,000 will include a 25% victim fine surcharge
  + Convictions/fines may be posted on the MOL website
* **Sentencing objectives**
  + 1. Deterrence (general and specific)
  + 2. Retribution (punishment)
  + 3. Rehabilitation/reform
  + **Factors considered in sentencing**: (*Cotton Felts*)
    - Size of company involved
    - Scope of economic activity at issue
    - Extent of actual and potential harm to the public
    - Maximum penalty prescribed by statute
    - OTHERS:
    - Mitigating factors
      * *Transpave*: spent $500k to upgrade facilities to European standards (*higher than Canadian – the legal requirements*), so court considered that in sentence
      * *Flex-N-Gate*: merely bringing operation into compliance with the law does not constitute a mitigating factor
        + Employer quickly upgraded safety standards to be complaint with stop-work order. Fines of $25k for two offences. TJ held this is a mitigating factor so ordered it to be paid concurrently ($25k total). COA disagreed, said you don’t get credit if you merely comply with the law, reinstated $25k per fine ($50k total)
    - Whether client has a prior provincial offences record
    - Whether there is proportion between offence and penalty being imposed
* **Worker Negligence**
  + This typically does not matter in terms of rebutting employer’s negligence (they still need to do their due diligence), however it rare cases it may be considered when they have done everything they ought to have reasonably done (providing protective equipment, training, supervision, etc.)
  + *Samuel, Sons & co*
    - Worker moving steel coils which weighed 10k pounds, cut band and coils fell on him and he was killed
    - Employer is charged and found guilty at trial. $160k fine
    - Appeal: had really good evidence of their due diligence – so court agreed that we can consider whether worker was negligent in determining whether employer can mount due diligence defence
      * Expert evidence that there was adequate training, proper instruction, etc.
      * Worker working for 18 yrs, 80 hours of training, had safety procedures
* **Workplace Violence and Harassment included in OHSA**
  + S 32.0.1, etc. OHSA: workplace violence and harassment as an occupational heath and safety matter
    - Have specific definitions in s 1 Act
  + Mostly procedural – policies must be in place
  + How to bring forward complaints, how they will be investigated, etc.
  + Particular section about domestic violation 🡪 steps you need to take
  + Must report results of investigation to complainant and respondent
  + Added an express duty: **investigation appropriate in circumstances must be conducted**
  + MOL can order you to have a third party investigator if they believe the investigation was insufficient

# Privacy in the Workplace

* **Three types of privacy interests:**
  + (1) Physical privacy
    - e.g. security guard pats down employee or checks their bags
  + (2) Informational privacy
    - individual’s interest in controlling the dissemination of their personal information
    - e.g. give SIN #, do not want employer sharing your SIN # with other people who might use it for nefarious purposes
  + (3) Territorial/Separate-spheres privacy
    - your interest in limiting your employer’s access to your home or off-duty conduct
    - e.g. employee called in saying they are ill, but there is a newspaper article of them finishing a marathon
* **Sources of Privacy Law**
  + Some provinces have a **statutory** tort of invasion of privacy
    - Quebec, BC, Alberta
    - Not Ontario (see below)
  + **Common law** tort of **invasion of privacy** (called **intrusion upon seclusion**) in **Ontario** – **TEST:** (*Jones*)
    - (1) D’s conduct must be intentional or reckless
    - (2) D must have invaded, w/o lawful justification, P’s private affairs or concerns
    - (3) reasonable person must regard the invasion as highly offensive *causing* distress, humiliation, or anguish
      * Claims from individuals who are sensitive or unusually concerned about their privacy are excluded
      * It is only intrusions into matters **such as**
        + one’s financial or health records
        + sexual practices or orientation
        + employment
        + diary, or
        + private correspondence
      * that viewed objectively on reasonable person standard can be described as highly offensive
    - P does not need to prove specific amount of economic damages that they want to recover
    - Damages will generally be measured by “modest conventional sum” in an amount of up to $20k
    - **Employer** may be liable if they create a “**risky situation**” where the wrongdoer’s improper access was made possible (*Evans*)
      * Must be careful when giving employees access to personal information of others and ensure good processes are in place to safeguard the information (*Evans*)
  + **CASES re common law tort of intrusion upon seclusion**
  + *Jones*
    - Two individuals, work for BMO in two different branches
    - Jones also used BMO as her personal bank
    - BMO does checks to ensure account integrity protected
    - They were surprised with Jones’ banking records – over span of 4 years, Tsige accessed Jones banking records 100+ times and no legitimate reason for doing so
    - *Tsige was in financial dispute with Jones’ husband*
    - She started monitoring Jones banking accounts – to see if he was paying child support to see if he had money
    - Tsige apologies to Jones and bank disciplines her
    - Brings action for intrusion upon seclusion and is successful based on the test above
  + *Evans*
    - Lead to a class action that invoked this new tort
    - Involves employee who is a mortgage admin officer (W) – has access to significant amount of client confidential info
    - Bank discovers that he took PI of 643 bank clients and disclosed that information to his GF, who then gave information to separate third party for the purposes of identity theft and fraud
    - Wilson admitted this
    - Bank notified clients of this breach and compensated them for it
    - One of the clients commences class action on this
    - Claimed bank is liable b/c bank did not properly oversee their employee
    - Bank granted W access to information and did not have good processes to safeguard information
    - **Bank’s failure to safeguard information created a “risky situation” where W’s improper access was made possible**
    - Class action was certified
    - Ultimately resolved outside courts – bank agreed to pay each victim additional $7k which was total of $1.1M in exchange for full release
* **PIPEDA – Privacy Legislation in the Private Sector**
  + PIPEDA = *Personal Information Protection and Electronic Documents Act*
  + Federal legislation!
  + **APPLICATION**
    - **FIRST**: determine if dealing with private sector or public sector
      * This applies to **private sector** – though there is *other* legislation that applies to the public sector
    - **SECOND**: does not apply to provinces that have “substantially similar” legislation (BC, Alberta)
    - **THIRD**: only applies to employees of **federal** undertakings (s 4(1)(b))
      * Although, it applies to every organization that “collects, uses or discloses” personal information in the course of commercial activities (***but*** not for *employees* unless they are a federal work/undertaking/biz)
      * 4 (1) This Part applies to every organization in respect of personal information that
        + (a) the organization collects, uses or discloses in the course of *commercial activities*; **or**
        + **(b)** is about an employee of, or an applicant for employment with, the organization and that the organization collects, uses or discloses *in connection with the operation of a federal work, undertaking or business*.
      * **Definitions – very broad!**
        + ***commercial activity*** means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.
        + ***organization*** *includes* an association, a partnership, a person and a trade union
        + ***personal information*** means information about an **identifiable individual.**

It must be identifiable

**If you anonymize it and there is no way to combine it back to determine who it applies to, privacy legislation does not apply**

* + **10 Principles**
    - Accountability
      * Responsible for personal information which they control and Must designate individuals to be accountable for organization’s practices
    - Identifying purposes
      * must identify purposes for which they are collecting personal information at or prior to time of collection
      * - e.g. get a job offer – ask for SIN number in order to ensure you are eligible to work in Canada
    - Consent
      * core concept of privacy law. Knowledgeable consent of an individual must be obtained before an organization collects or uses or discloses personal information in the course of commercial activity
        + In some cases, can be express, in others it can be implied
        + ***Exceptions*** also set out – e.g. think this person is at risk of harming themselves, can we call police to tell them about it? Yes.
    - Limiting collection
      * not allowed to collect PI indiscriminately. Obligated to **limit** collection of PI to only what is *necessary* to **fulfill organization’s purpose**
    - Limiting use, disclosure and retention
      * prohibits organizations from using or disclosing personal information for any purpose other than the one for which it was collected unless person consents or as required by law
        + New use = new consent
    - Accuracy
      * organizations must **maintain** PI as accurately, completely, as up to date, as necessary for purposes for which it is being used
      * e.g. if resubmitting benefits every year, then should give people opportunity to update their PI every year
    - Safeguards
      * organizations obligated to protect PI against loss, theft, unauthorized access, unauthorized disclosure, etc. regardless of the format in which it is held (depends on the sensitivity of the information)
      * e.g. physical info – locked filing cabinets, etc. online info – encryption, etc.
    - Openness
      * required to provide accessible and specific information about policies and practices relating to the handling of personal information
    - Individual access
      * upon request, individual must be informed of existence, use, and disclosure of information of his/her PI
    - Challenging compliance
      * must have a method by which they can challenge compliance and it must investigate all complaints it receives
  + **Enforcement of PIPEDA**
    - **Complaint process:**
      * To organization first
      * Then to Privacy Commissioner
        + Investigation process
        + Application to Federal Court – if unhappy with result of privacy commissioner investigation
    - Privacy commissioner has broad power to conduct informational programs to educate the public, etc. – not only hear complaints
  + **Workplace Surveillance and Electronic Monitoring**
    - **TEST FOR SURVEILLANCE**: (*Eastmond*)
      * (1) Surveillance must be demonstrably necessary to meet a **specific** **need**
      * (2) Measure must be likely to be effective in meeting that need
      * (3) Loss of privacy must be proportional to the benefit gained
      * (4) Existence of any less privacy invasive way to meet the needs must be considered – alternatives
    - ***Cole* factors for privacy interest**
      * Closer that PI lies to biographical core of PI, the higher the privacy interest
      * Browsing interest reveals a lot about your biological core – your interests, preferences, etc.
      * Must also consider reality of situation – who owns the computer and material on it? (not determinative though)
      * What are operational realities of who has access to it?
        + E.g. maintenance/IT staff have regular access to it? Then diminished privacy interest
      * ***Reeves***: may have privacy interest in a shared computer, even if other person using it consents to search
    - **CASES**: (don’t really need these except for certain facts)
    - *Eastmond v CPR* – video surveillance to prevent theft found to be reasonable
      * Video camera installed by CPR – 6 video cameras in parking lots, etc. (areas of general access – not private)
      * They were fixed – did not have ability to zoom
      * CPR took position that surveillance was needed to deter theft (months leading up to the cameras had skyrocketed)
      * Before they posted cameras, they posted notices that cameras had been installed and would start taping. Posted signs stating area is under surveillance
      * CPR said video feed would not be viewed live – if there wasn’t incident, would not be viewed – re-recorded 48 hours
      * Worker complained to privacy commissioners
      * Federal court: CP’s surveillance cameras do not contravene PIPEDA
      * Reasonable person would consider their installation of cameras to be reasonable given the past problems, employees knew were they were, notices given, etc.
        + Lots of arguments in favour of CPR
        + Minimal intrusion, they considered fencing, etc. but convinced court why they weren’t working
      * Can’t use it to measure employee productivity for example
        + This would contravene this Act – but they limited their purpose just to limit theft
    - *Parkland Library* – keylogging software to measure productivity not found to be reasonable
      * Unbeknownst to IT person, library installs key-logging software
      * He finds this and brings complaint to privacy commissioner – who held that employer does not have justification for this
      * Could use it for personal banking
      * He was only IT person being monitored
      * This continuous monitoring of working life is highly intrusive and especially when used w/o telling employee
      * Other less intrusive means: more supervision, etc.
      * If it wanted to install this kind of program, would be under an obligation to tell employees
    - *Cole*
      * Arose in non-employment setting (criminal), but get sense of what *factors SCC believes are important* and those might have carryover implications to employment law
      * Cole high school teacher, given laptop, given admin rights on school’s network. Allowed him to access hard drive on students’ laptop. He was allowed to use his laptop for incidental personal use.
      * One day school technician who did regular maintenance who finds hidden folder on Cole’s laptop. Naked photos of HS student. Technician gives photos to principals. School board technicians put on CD. **Police review all of it w/o warrant**
      * Cole charged with possession of child pornography
      * Charter issue – **Cole’s lawyer argues that s 8 rights**
        + *Must show that he had a reasonable expectation of privacy over the contents of his work computer*
        + Closer that PI lies to biographical core of PI, the higher the privacy interest
        + Browsing interest reveals a lot about your biological core – your interests, etc.
        + Must also consider reality of situation – who owns the computer and material on it? What are operational realities of who has access to it?
        + Held: school board has a clear policy that it owns the hardware and the data that is stored on it. Factor that weighs against reasonable expectation of privacy

This factor went both ways – in terms of operational realities

It allowed them to do IT maintenance

He did not have exclusive control – technicians did maintenance and he knew that

* + - * + Considering totality of circumstances, court concluded that even though privacy interest was diminished by ownership issues, workplace policies and operational realities, these factors did not completely eliminate his otherwise objectively reasonable expectation of privacy in the contents of the laptop
        + S 8 right infringed
        + Saved under s 1

Evidence permitted to be introduced

* + - * + This case was very interesting b/c those factors – might be relevant in privacy in employment law context
        + Need to think about ownership issues, operational realities and who has access to it, creating policies, etc.
        + To ensure that people don’t have large right of privacy
    - *Reeves*
      * Shares home and home computer with spouse
      * Spouse gets restaining order following cahgres of domestic assault
      * When she contacts police, she also reports that she found child porn on computer
      * Police took computer nad searched contents w/o warrant
      * The issue is that it wasn’t his computer, it was shared, and she consented
      * Similar to cole: strong privacy interests – reveals info
        + Even though it was shared, still needed to get consent from him or warrant. Not enough to get her consent
      * Ownership access is shared – could happen in workplace
  + **Biometrics –** *Wansink*
    - E-speak – allowed access to telus by voice print
    - Variety of employees filed complaint with privacy commissioner – refused to give voice print
    - FCA: voice print is a small encroachment – sided with Telus
    - *Voice print is reduced to a series of number data*, not actually the voice of the person
    - Court satisfied that *telus took appropriate security measures*
    - Lead evidence re cost effectiveness of technology
    - Proportionality of loss of privacy