**Fall**

20

Employment Law Summary

Professor Demeyere

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## Introduction

## An Overview of the Canadian Law of Work

#### Three Regimes of Work Law in Canada

* One way to view Canadian work law is as consisting of three overlapping regimes
  + **Common Law Regimes**
    - This is the law of contracts and torts
    - **Contract:** an exchange of promises, a *quid pro quo*
    - In the case of employment, we simplify this exchange to a work for wages exchange – the worker promises to work in exchange for the employers promise to compensate the work through wages and other forms of compensation such as benefits
    - Contract of employment is what binds an employer and an individual employee
    - These contracts are sometimes referred to as individual contracts of employment rather than collective agreements which bind the employer (or group of employers) with a group of employees that are represented by a union or professional organization
    - The common law is what governs the individual contract of employment
    - A question often raised is the relevance of **freedom of contract**- the idea that everyone should be free to contract with whomever we want on whatever terms we want or not to contract at all
      * What lies at the heart of contract law is that the parties create the contracts, the courts merely enforce them. Therefore, parties should be left free to choose when, how and even whether they wish to obligate themselves contractually
  + **Regulatory Regimes**
    - This is where you find legislative attempts to respond to and mitigate the inequality of bargaining power between employer and employee
    - Here we are talking about legislative initiatives to protect employees by imposing obligations on employers and conferring rights and entitlements on employees
    - Legislative interventions are justified on the grounds of the inequality in bargaining power that exists and on the vulnerability of employees as a group
    - We will be discussing two categories of legislative involvement:
      * *Ontario Employment Standards Act*, 2000
      * *Ontario Human Rights Code*
      * What these legislations have in common on a general level is that they restrict freedom of contract by imposing minimum standards and requirements for Canadian workplaces that trump or take priority over the common law
      * They restrict the conditions on which employers may contract or refuse to contract
    - Federally regulated employees are governed by the *Canada Labour Code*
    - These statutes are administered through tribunals
  + **Collective Bargaining Regime**
    - Beyond the scope of employment law, more of a labour law topic
    - Like the regulatory regime, this regime is an attempt to address the inequality of bargaining power by conferring more power on works to improve their bargaining power
    - It does this by setting out a regime that allows groups of workers to bargain collectively, to use their collective strength to bargain with their employer
    - In Canada, governed through labour law which sets out, mostly through statute, the rules for formation and administration of unions, collective bargaining, and industrial conflict in the forms of strikes and lock outs and workplace disputes enforced by labour relations boards & arbitrators
    - Employees represented by unions have their employment governed by a collective agreement and workplace issues are decided through agreements, arbitration procedure. Statues such as the
    - *Employment Standards Act* and *Human Rights Code* do still apply but the grievance/arbitration procedure is what sets out the avenue for dispute resolution rather than the separation tribunals

**Employment Law or Labour Law**

* Employment law refers to the body of laws, common law and statutory, that govern the individual contract of employment (the non-unionized workplace)
* Labour law refers to the law that governs the unionized relation from unionization to collective bargaining etc.
* When faced with a workplace dispute, important to first determine whether the employee(s) in question are union represented. If so, dispute must be decided under collective agreement. If not, legislation will apply directly
* You also will need to consider the relevant jurisdiction – provincial, territorial, or federal
* One of the most notable differences between employment and labour law is with dismissal when an employee challenges their dismissal from employment
  + The non-unionized employee’s remedy is at common law or at statute
  + The unionized employee’s remedy is through the collective agreement
  + The remedies can be very different, so it is important to know which context you are dealing with
    - In the employment law setting – the remedy for wrongful dismissal is almost always damages. Courts do not order specific performance or reinstatement of dismissed employee to their position.
      * Typically, Tribunals also so not order reinstatement though they are empowered to do so
    - In the labour context, reinstatement is quite common.

## What’s Distinctive about the Contract of Employment?

* There are 3 features of employment contract that set them apart from other contracts and arguably need special treatment
* Wrongful dismissal actions (action brought by an employee against former employer) make up about 90% of employment law cases
  + Action for breach of contract. The breach is not the dismissal itself but the employer’s failure to give sufficient notice of the dismissal. Term in every employment contract which requires employers to give notice of dismissal when it is not for cause
  + Cause refers to employee conduct that is itself a breach which entitles employer to treat employment contract as at an end
  + In these situations, we always first want to look at whether there is an expressed term in the employment contract with regards to notice. Even where there is an expressed term, there may be issued surrounding the validity of this term
  + If there is not, common law will imply a duty on the both parties to provide reasonable notice to terminate a contract
* Like all contracts, employment contracts are subject the rules of contracts including offer, acceptance, and consideration
* Employment contracts are also subject to liability for misrepresentation while bargaining

#### Otto Kahn-Freund

* He was a professor in the UK who wrote several texts and articles on employment law in the 1960’s and 1970’s
* Most frequently cited observations is that contract of employment is “cornerstone of the modern employment relationship”
  + He meant that the legal foundation of the relationship is a contract, the voluntary exchange of promises between two parties
  + But he also suggested that the legal characterization of the relationship was not accurate

#### Features that Set Aside Employment Contracts from Other Contracts

1. Employment is a relation rather than a transaction
   * Courts have often noted that unlike a commercial contract, an employment contract is not a discrete transaction. Absent evidence of the party’s intentions to the contrary, the employment contract is presumed to be of indefinite duration. Because of this indefinite duration, terms in employment contracts are often vague and fluid
   * Relation because the relationship arises through mutual agreement but given its long-term nature, the agreement is not expected to anticipate all possibilities and instead provides only a general framework for parties’ relationship
   * The rights, obligations and reasonable expectations of employers and employees may change over time and often in the absence of express agreement.
2. Labour, unlike other commodities, is special because it is integral to an individual’s sense of identity and self worth
   * Work is special and may make the employment relationship a distinct kind of contract
3. Most employment relationships are marked by a disparity in bargaining power that favours the employer
   * Employers typically have superior bargaining power and employees are often presented with an employment opportunity on a take it or leaver it basis and there is no real negotiation to be had between the parties.
   * Katherine Swinton, “Contract Law and the Employment Relationship: The Proper Forum for Reform”
     1. “[t]he terms of the employment contract rarely result from an exercise of free bargaining in the way that the paradigm commercial exchange between traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.”

### Ditchburn v Landis & Gyr Powers Ltd., [1995] OJ No 2882

* The difference between employment and transactional commercial contract was dealt with in this case

**Facts:** D was a sales executive with 27 years of exemplary service. In 1993, employer implemented some workplace changes that required sales employees to rely more on computer skills and less on interpersonal skills. D was demoted to a less prestigious and less demanding position. D intended to resign and arranged to meet with a client during business hours to “tie up some loose ends”. They had lunch, consumed several beers, and continued drinking for several hours at a strip club. Upon return to the client’s place of business, D and the client had a physical altercation resulting in injuries to both. The employer dismissed D without notice. D sued for wrongful dismissal.

**Prior Proceedings:**  At trial, in determining whether the employer had just cause to dismiss D, Epstein commented that the facts of the case must be examined in light of the concept of the evolution of contractual rights and obligations inherent in a relationship contract of this nature. She suggested that when D originally joined the company, he could reasonably expect very little from the company but, after 27 years of dedicated and competent service he could reasonably expect much more from the employer.

* “[T]o an employee of almost 60 years of age who had devoted one half of his life to his employer; to a man who had made a significant contribution to the company; to a man who had no previous history of bad judgement exercised on the job; in a situation where the company was clearly not injured in any way – the employer had considerable obligations, even in the fact of a breach of company policy. It owes the employee more than the benefit of the doubt. In a situation as this, it owes a response of loyalty, support and then additional support if the employee provides to have a problem for which he or she requires assistance.”

**Held:** Employer dismissed D without just cause and she awarded damages in the amount of 22 months salary in lieu of reasonable notice and an additional 2 months because employer refused to provide a reference letter. She would have given an addition $15K for mental distress.

**Appeal:** ONCA upheld the 22 months notice award and the additional damages for mental distress. The judge on appeal stated that D’s breach of company policy did not amount to just cause given his long and unblemished record of service and that the reasonable notice of 22 months was appropriate. Judge upheld the award of damages for mental distress on the grounds that the employer, by breaching an implied obligation under the contract to provide support such as counselling to a loyal and long standing employee, committed an independent actionable wrong for which damages could be awarded. CA agrees that the employment relationship evolved to such a point that now we could say that the employer owed these obligations to D by the time of his dismissal. Employer had not only breached the obligation to provide reasonable notice of termination in the absence of just cause but also an implied term to support and provide assistance to a dedicated, long term employee.

**Ratio:** Employment contracts differ from commercial contracts in that employment contracts can have implied terms based on the relationship’s purpose and history. The same employee conduct that may amount to dismissal of the employee early in the relationship may not have the same effect as it did in this case once the relationship proves to be long term. Courts are willing to read into the employment contract an obligation on employees and employers to cooperate and support one another in the spirit of continuing the relationship.

### Ref re Public Service Employee Relations Act (Alta) [1987] 1 SCR 313 at 368

* Dickson J. – “Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.”

### Slaight communications Inc v Davidson [1989] 1 SCR 1038

* Dickson J., adding to his comments in the *Ref Re Public Service Employee Relations Act:*
  + “viewing labour as a commodity is incompatible with such a perspective.”

### Wallace v United Grain Growers [1997] 3 SCR 701

**Facts:** W was persuaded by Employer’s promise of secure & rewarding employment until retirement. W left secure position with previous employer to accept sales position. After 14 years successful service, W was dismissed without notice or explanation. W sued for wrongful dismissal. Employer maintained vague allegations of just cause up until the day of trial. W suffered mental distress and damage to reputation.

**Issue:** Did the harsh and unfair manner of dismissal entitle W to some form of extended damages?

**Held:** Justice Iacobucci upheld a reward to W of 12 months reasonable notice and an additional 12 months notice to reflect employer’s insensitive and callous manner of dismissal.

**Analysis:** Iacobucci departed from a long line of cases which stated that there was no basis to justify an extension to a reasonable notice award.

* The employment contract has “unique characteristics” and governs a “special relationship.” “For most people, work is one of the defining features of their lives.” “the loss of one’s job is always a traumatic event.” The way one’s employment is terminated “is equally important to an individual’s identity as the work itself.” The law ought to encourage employer conduct that “minimizes the damage and dislocation (both economic and personal) that result from dismissal.”

**Ratio:**  There is a whole new set of damages in employment relationship given the special nature of the employment relationship.

**Note:** Decision has been overturned by the Supreme Court, but we will see later in the course what he current state of *Wallace* damages are.

### Machtinger v HOJ Industries Ltd [1992] 1 SCR 986

* The inferior bargaining power was cited in this case as a justification for departing from the general rules of contract interpretation

**Facts:** M and L were employed by the dealership for 7 years when they were both dismissed without cause. Both employees signed employment agreement specifying the amount of notice of termination to which they would be entitled. Both agreements were standard form contracts with blank space left for the number of weeks of notice. On M’s agreement, the number “0” had been written in the blank and on L’s agreement, the work “two” had been written in the blank. Both were well below the statutory minimum provided for in the *Employment Standards Act.* The employer paid each employee four weeks notice, in accordance with the legislative minimum requirement (at the time).

**Issue:** Did these written contracts rebut the presumption at common law that an employee is entitled to reasonable notice of termination?

**Prior Proceedings:** TJ held that the notice provisions in the employment contract were invalid because they did not comply with the minimum notice period of 4 weeks required by the *ESA.* M was awarded 7 months notice and L was awarded 7.5 months notice. ONCA found that although the contractual notice provisions were null and void, the provisions nevertheless provided evidence of the parties’ intentions to rebut the presumption of reasonable notice at common law. ONCA held that both M and L were entitled to 4 weeks notice as that was the minimum lawful amount provided for by the act.

**Held:** SCC restored the trial judge’s decision.

**Analysis:** Harm which the *ESA* seeks to remedy is that individual employees are often in an unequal bargaining positions in relation to their employers. Fundamental to his decision to award the employees reasonable notice at common law was not the actual intentions of the parties but instead the fact that the majority of individual employees are likely to be unaware of their statutory and common law rights upon termination of their employment.

* Iacobucci J. - “individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers.”… “Accordingly, an interpretation of the *Act* which encourages employers to comply with the minimum requirements of the Act, and so extends it protections to as many employees as possible, is to be favoured over one that does not. In this regard, the fact that many individual employees may be unaware of their statutory and common law rights in the employment context is of fundamental importance.”

**Ratio:** A contractual term that falls below a legislative minimum is invalid. Courts are willing to depart from the general principles of contract law in employment relationship contexts where there is an inherent inequality of bargaining power between the employee and the employer.

## The Employment Relationship in Historical Perspective: From Status to Contract

#### The Legally Defining Feature of Employment

* **The legally defining characteristic of the employment relationship is control by the employer over the employee**
  + “The essence of the relationship is not the appointment, payment of wages or power to dismiss, but **control**”
  + “It is the [employer’s] **right of control**… which is the dominant characteristic of this relation.”
  + “The essential criterion of employer-employee relations is the **right to give orders and instructions** to the employee regarding the manner in which to carry out his work.”
  + “[T]he hallmark of the employment relationship is the **subordination** of the employee to the **authority of the employer.”**
  + “There can be no employment relationship without a **power to command and a duty to obey,** that is without this element of subordination in which lawyers rightly see the hallmark of the ‘contract of employer’.”
* Control is also one of the factors that is considered in determining whether a work relationship falls in the scope of employment law
* Law distinguishes between employees governed by employment law and independent contractors governed by the common law
* Once an individual is found to be an employee rather than an independent contractor, the law entitles that employee to certain rights and benefits. Employee status is the gateway to the rights and protections under the *ESA.*
* The hierarchy and element of control is itself built right into the common law of employment. Contemporary employment law doctrine gives expression to and enforces the subordination of the employee to the employer’s control.
  + i.e, common law rule that employee’s refusal to obey employer’s order entitles employer to dismiss employee with cause

#### The Default Structure of the Employment Relationship at Common Law

* 2 co-relative implied terms which show the hierarchal nature of the employment relationship:
  + The employee’s duty to serve &
    - Employee’s duty of loyalty or fidelity
    - Duty to respect employer’s authority
    - There are limits to this
  + The employer’s right of managerial prerogative
    - Implied term that the employer has the authority to manage the labour process in it’s workplace
    - There are limits to this
* We can relook at the three features above based on these implied terms:
  + Work is a relation of subordination
  + Work is integral to one’s identity because it requires one to submit to control of another. Worker gives more than just work
  + Employment is marked by market inequality and legal inequality
    - There are arguable two sources of inequality between employees

### Stein v British Columbia Housing Management Commission, 1992 CanLII 4032 (BC CA)

* “[A]n employer has a right to determine how his business shall be conducted. He may lay down any procedure he thinks is advisable so long as they are neither contrary to law, nor dishonest, nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term in every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.”

## Who is an Employee?

* This is a threshold question because it is a question that must first be asked to determine whether we are dealing with an employment law matter or whether the matter falls to be decided under another area of law
* There are a variety of work relationships and employment law focuses on those where the worker can be said to fall within the meaning of an employee

## Employee or Independent Contractor?

#### Employee Status

* Why does it matter?
  + Employee status is relevant in determining vicarious liability in tort law. An employee works under the employer’s control and so in those situations, the employer is more likely to be considered vicariously liable for the damage
  + There are also implications in income tax law
    - The *ITA* treats independent contractors as businesses and permits them to claim expenses. Employers of employees are responsible for collecting Canada Pension premiums, income tax deductions and employee benefits from the amounts they pay their employees but not their independent contractors
* Employee performs work under a contract **of** service whereas an independent contractor performs work under a contract **for** service

#### Independent Contractor vs Employee

* “Although there is no universal test to determine whether a person is an employee or an independent contractor … [t]he 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.”
  + *Sagaz Industries* [2001] 2 SCR 983
  + There is no set test or weight to eb given to any particular factor, this is just oen general principle
  + Guiding question is whether the worker is working for him or herself (independent contractors) or for another company (employee)

#### *Ontario Employment Standards Act*, 2000 Section 5.1

* (1) An employer shall not treat, for the purposes of this Act, a person who is an employee of the employer as if the person were not an employee under this Act.
* (2) If during the course of an employment standards officer’s investigation or inspection or in any proceeding under this Act, other than a prosecution, an employer or alleged employer claims that a person is not an employee, the burden of proof that the person is not an employee lies upon the employer or alleged employer.
  + These sections make it clear that the burden of proof is on the employer to establish that the individual is not an employee
  + Courts will insist upon clear evidence from the employer to prove that the worker is not an employee

|  |  |
| --- | --- |
| **Factors that suggest the worker is an employee** | **Factors that suggest the worker is an independent contractor** |
| The company sets working hours and assigns work. | The worker has considerable discretion over when and how to perform work. |
| The company owns the tools needed to do the job. | The worker owns the tools needed to do the job. |
| Company controls how work is done and closely supervises work. | The worker receives little direct supervision by the company. |
| The customers/clients are the company’s. | The worker has a variety of customers/clients. |
| The worker works exclusively for the company. | The worker advertises his or her services on the open market. |
| The work is performed at the company’s premises. | The worker has his or her own office and pays own expenses. |
| The worker has no personal assets invested in the company. | The worker has invested their own money in the business, so is at risk of loss but could earn a profit. |
| The worker must perform assigned tasks himself or herself. | The worker can hire others to perform work. |
| Regular employee deductions are made from pay. | Worker issues invoices to the company; no employee deductions are made. |

#### Employee or Independent Contractor

### Braiden v La-Z-Boy Camada Ltd. (Ontario CA, 2008)

**Facts:** B worked for La-Z-Boy for 22 years as a sales representative. The contract stated that B was an “independent sales and marketing consultant” and not an “employee” of La-Z-Boy. B was required to incorporate a business and to submit invoices to La-Z-Boy reporting his sales each month. B worked mostly from a home office, paid his own expenses and was paid solely on the basis of commission. La-Z-Boy set prices, sales territories, and sale targets. B was prohibited from selling other products and from assigning his work for La-Z-Boy to other workers.

**Held:** The court followed *Sagaz Industries* and determined that B was an employee and not an independent contractor.

**Ratio:**  Employers are required to give reasonable notice of dismissal to employees unless the contract specifies some other lawful minimum. This duty is owed to employees but not independent contractors.

EMPLOYEES

Subordinate to and economically dependant on their employer

**\*employment laws apply\***

INTERMEDIATE CATEGORY

“Dependant contractors” who are economically dependant contractors

**\*employment laws may apply\***

INDEPENDENT CONTRACTORS

In Business for themselves

**\*employments laws don’t apply\***

## Dependant Contractors

* It can be helpful to think of the categories of employee, dependant contractor and independent contractor on a continuum
  + Dependant contractors is the intermediary category
* Workers who are not employees may still be considered dependant contractors and therefore governed by employment law and so entitled to notice of termination.

### McKee v Reid’s Heritage Homes Ltd, 2009 ONCA 79

**Facts:** McKee owned a business called Nu Homes and in 1997 she signed a sales and advertisement agreement on behalf of Nu Homes, her company, with Reid’s Heritage Homes. According to the contract, McKee agreed to advertise and sell 69 homes for which she would charge Reid $2,500 per home sold. The agreement stated that Reid’s would have almost exclusive use of New Homes services and the contract states that either party could terminate the agreement for any reason upon 30 days notice. After the first 69 homes were sold, McKee continued to sell homes for Reid’s without a new agreement in place. Reid’s supplied stationery and forms for selling homes and McKee was given the title of “Sales Manager”. Reid’s paid McKee through her company, Nu Homes. McKee hired, trained and managed her own subagents with whom she split her commissions from the sales. She did this entirely through her company, Nu Homes, without any involvement from Reid’s. In 2004, Reid restricted its salesforce and in 2005 McKee was told that her subagents would work for Reid’s as direct employees. Around this time, negotiations around McKee’s own relationship with Reid broke down and McKee, 64 at the time, sued Reid’s for wrongful dismissal. Reid’s maintained that McKee was an independent contractor and therefore not entitled to notice of dismissal.

**Prior Proceedings:**  TJ found that McKee was an employee. Her activity of selling homes was an integral part of the defendant’s business. She was awarded damages for reasonable notice equal to 18 months pay. Reid’s appealed. On appeal, court asked whether there exists an intermediate position of dependant contractor between employee status and independent contractor status.

**Held:** Appeal dismissed and trial award was reasonable. McKee was an employee.

**Analysis:** Given the relationship of economic dependency, it makes sense to entitle these workers to reasonable notice at common law. Evidence of economic dependency would usually occur where the contractor works exclusively for the company in question.

* Court explained that determining whether a worker falls within this dependant worker category is a two-step test:
  + (1) You ask whether the person is an employee or a contractor which requires asking the questions in *Braeden* case such as:
    - whether the worker was limited exclusively to the service of the company (if so they are more likely an employee);
    - whether the worker is subject to the companies rules regarding work and the way the work is performed (if so, they are more likely an employee);
    - whether the worker has an investment or interest in the tools relating to the service (if they do, they are more likely a contractor);
    - whether the worker has undertaken any risk or has any expectation of profit associated with the delivery of the services (if so, they are more likely to be a contractor)
    - Whether or not the activity of the worker is part of the business organization of the company (in order words, whose business is it) (the more the worker is part of the business organization, more likely they are an employee)
    - If the worker is found to be an employee, then they analysis is complete!
  + (2) This question then asks about the degree of economic dependence. If a contractor works exclusively for the company or is otherwise economically dependant on the company, contractor will likely be ***dependant*** and entitled to reasonable notice.
* CA did not disturb the lower court finding that McKee was an employee. The court pointed to the fact that the company controlled where she sold homes, promotional methods to use, what to sell and how much to sell it for. She used model homes provided by Reid’s, she used stationary and forms provided by Reid’s and she was financially dependant on Reid’s in that she relied on fix commissions without any further chance for profit and she did not risk any significant capital herself. The fact that she operated through her own business and hired subagents did not outweigh the other factors.
* CA did not need to move on to the second step above to consider whether there was sufficient economic dependency for her to be considered a dependant rather than an independent contractor

**Ratio:** Affirmed category of dependent contractor and set out 2-part test. Dependant contractor status may apply where the person is not an employee but nevertheless a relationship of economic dependence was present.

### Keenan v Canac Kitchens Ltd, 2016 ONCA 79

**Facts:** Lawrence Keenan worked for Canac Kitchens for about 32 years and although his job title changed, his main role was to supervise the delivery, installation, and service of Canac Kitchens cabinets. Lawrence’s wife, Marilyn, was also employed with Canac Kitchens. She was a foreman and had worked for the company for 25 years. Until 1987 they were both considered employees, but at some point in 1987 they were informed they would no longer be employees but would be independent contractors. They were told that they should incorporate, and they were told to sign a document stating that they were subcontractors of Canac. Between that change and 2007 the Keenan’s worked almost exclusively for Canac. They each wore shirts with the company logo and had Canac business cards. They enjoyed employee discounts and Lawrence received a ring for 20 years of loyal service to the company. In 2007 business slowed down and the Keenan’s did some work for one of Canac’s competitors, Cartier Kitchens. However, most of their work up until their termination in 2009 was with Canac.

**Issue:** Were the Keenan’s entitled to reasonable notice of termination? If they were employees they would be, but if they were independent contractors they would not be.

**Prior Proceedings:** Trial judge found they were dependant contractors.

**Held:** Agreed with trial judge that the Keenan’s were dependant contractors. Upheld TJ award of 26 months reasonable notice.

**Analysis:** The court point to the following factors in determining that the Keenan’s were dependant contractors:

* There was occasional weekend work performed for other companies, but they were mostly exclusive to Canac
* Canac maintained control over the business including the setting of deadlines and the flow of work
* While the Keenan’s owned some of their own tools, they used Canac’s business premises, phones and filing cabinets for their services

The Keenan’s were very much part of Canac’s business, wearing shirts with the logo and they had the Canac business cards. The court decided that these factors tipped the scale in favour of a dependant contractor relationship rather than an independent contractor relationship.

* On appeal, Canac took issue with the trial judge’s finding of exclusivity. Canac acknowledged the Keenan’s had worked exclusively for the company up until the end of 2006 but they argued that exclusivity is a matter to be determined at the time of termination of the relationship and they said that the Keenan’s were less exclusively working for Canac at that time. Court of Appeal rejected this view by stating that exclusivity cannot be determined on a snapshot approach because it is integrally tied to the question of economic dependency. The Keenan’s had worked exclusively for Canac from 1976 to 2007 and even when working for another company after 2007, most of their work was with Canac. All but 2 of the years were exclusively served at Canac. That amount of exclusive service supported a finding that they were dependant contactors.

**Ratio:** Exclusivity is to be assessed over the life of the relationship and must be determined by considering the entirety of the relationship.

### Thurston v Ontario Children’s Lawyer, 2019 ONCA 640

**Facts:** Thurnston was a sole practitioner lawyer who provided legal services to the OCL pursuant to a series of agreements over a period of 13 years. Each year, the OCL had Thurston and other lawyers sign a fixed term contract and the work she did for the OCL made out about 40% of Thurston’s annual income. According to the contract she signed the office made no guarantee of the total value or volume of work that she would receive and stated the office could terminate the contract in any circumstances without notice. When OCL decided not to renew her contract in 2015, she claimed that she was a dependant contractor and was therefore entitled to 20 months notice of termination.

**Prior Proceedings:**  Allowed Ms. Thurston’s claim. OCL appealed.

**Held:** CA reversed trial courts decision. CA found that Thurston’s relationship with OCL fell short of being one of economic dependence. Thurston was found to be an independent contractor and not entitled to reasonable notice of termination.

**Analysis:** CA said that a worker claiming dependant contractor status must lead evidence showing minimum economic dependency on the contract. They must be able to show some baseline level of dependency. CA said that plaintiff will demonstrate sufficient economic dependency with evidence of near complete exclusivity.

* Court pointed to the *McKee* decision and its emphasis on exclusivity for the dependant contractor status
* CA said that Thurston failed to establish required degree of exclusivity which would demonstrate her economic dependence on OCL.
  + Thurston maintained an independent legal practice throughout her position with the OCL and her work with the office averaged only about 40% of her annual billings

**Ratio:** Near exclusivity necessarily requires substantially more than 50% of income.

## The Changing World of Work: employee Status and the Gig Economy

### Uber Technologies Inc v Heller, 2020 SCC 16

* SCC struck down a contract clause between Uber and its driver’s which stated all disputes must go to arbitration in the Netherlands
* Immediate implication is that the case can proceed in the courts. The next step is a motion of certification of Heller’s claim as a class proceeding on behalf of Uber drivers and some determination on the merits of whether a driver’s relationship with Uber is governed by the *Employment Standards Act*
* One driver resists the employee model and would prefer to work as an independent contactor

## Recruitment, Hiring and Creation of the Contract of Employment

## Human Rights Issues

#### Human Rights in Hiring

* HR issues can arise at the pre-employment stage such as job postings, recruitment, applications, interviews, candidate selection and hiring decisions
* Common Law Approach
  + *Bhadauria v Seneca College*
* Human Rights Legislation
  + *Haseeb v Imperial Oil*

#### Distinction and the Common Law

* The common law of contracts is committed to the freedom of contract which is the idea that individual contractors should be free to choose with whom they want to contract, on what terms they want to contract and whether they want to contract at all
* For the most part, the common law buts out of the pre-contractual stage focusing just on things like dishonesty and misrepresentation which threaten the integrity of the contract as a free and voluntary set of rights and obligations
* Staring in the 1950’s in Canada, we started to see the formation of anti-discrimination laws in Canada such that employers could not refuse to hire someone because of their race for example

### Christie v York Corporation [1940] SCR 139

* **Facts:** This case involved discrimination by a tavern in refusing to serve Christie on the basis that he was black. Christie sued and claimed damages for the mental distress and humiliation that he suffered. Christie lost.
* Discrimination by tavern owner; no claim because of “freedom of commerce”
* Stands for the common law concept of freedom of contract
* The SCC said that freedom of contract or “freedom of commerce” was decisive. In the absence of any legislative prohibition against refusing to serve there was no basis in law to interfere with the contracting freedom of the business

### Bhadauria v Seneca College, [1981] 2 SCR 181

**Facts:** Bhadauria was a woman of East-Indian origin who applied 10 times for a position as an instructor at Seneca College. Although she was qualified for the position, she was never once invited for an interview. She brought a common law action in the courts alleging she had been discriminated against based on her race. Her counsel argued that the court should recognize a new tort – a tort of discrimination which would prohibit discrimination in hiring decisions or alternatively, a right to bring a common law claim based on the *Ontario Human Rights Code* which prohibited discrimination in hiring based on numerous grounds including race. ONCA agreed and, pointing to the human rights code as evidence that an anti-discrimination norm was part of modern public policy, said it was time for the courts to recognize a new court of discrimination

**Held:**  SCC disagreed, and they reaffirmed the common law’s commitment to freedom of contract.

**Reasons:**  A refusal to enter contractual relations has not been recognized at common law to give rise to any liability in tort. Their reasoning was essentially since there has not been such a tort, there should not be such a tort.

* Allegation of discrimination in hiring; there can be no common law tort of discrimination
* They did go on to consider whether the SCC should develop the common law so as to recognize a tort of discrimination.
  + “The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under [human rights legislation] … [N]ot only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. Code has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use.”
    - Bhadauria could have brought a complaint under human rights legislation and use the enforcement scheme established under the legislation but she had no claim against Seneca College at common law

**Note:**  This case has not been overturned or revisited by the courts. This case has also been interpreted as preventing the recognition of a common law tort of sexual harassment. Sexual harassment is recognized as a form of sex discrimination under human rights legislation and as such, most plaintiffs seeking common law damages for sexual harassment have had their claim shut down on jurisdictional grounds. A victim of sexual harassment who seeks common law damages would be well advised to rely on known causes of action, existing torts (assault, battery, defamation) rather than allege a tort of harassment or sexual harassment.

#### *Ontario Human Rights Code*, R.S.O. 1990, c. H.19

* During the 1960’s and 70’s Canadian jurisdiction began consolidating the various pieces of anti-discrimination law dealing not only with employment but also housing and other services into consolidated human rights codes
* The bodies created to address these orders were given remedial powers- they could order reinstatement, damages paid to victims, the reorganization of the workplace to remove discriminatory barriers and order employers to implement training in the workplace
* **Section 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”
    - This right to equal treatment spans the whole of the employment relationship from formation to termination. It applies to recruitment and hiring decisions.
    - What makes the issue of discrimination at the hiring stage a bit trickier is that establishing that there has been discrimination in the first place can be difficult. It may be difficult to prove that an employer refused to hire someone for discriminatory reasons. At this stage of the relationship, the principle of freedom of contract still holds a lot of weight. Employers should be able to judge the suitability of a candidate for a job and this can sometimes be subjective. There can be implicit bias in the decision-making process when making hiring decisions.
    - Definition of some of the prohibited grounds:
      * Age: being 18 years old or older.
      * Disability: broadly defined in the Code. It includes physical disability, mental impairment, developmental disability and learning disability. Disability is the ground that is more frequently raised. This ground also catches discrimination on the perception that a person is disabled or that they were disabled in the past. Drug and alcohol addictions also fall within the category of disability.
      * Family status: Defined in the code as being in a “parent and child relationship” whether you are the parent or the child.
      * Marital status: being married, single, widowed, divorces, separated or common law
      * Record of offences: refers to a conviction for “(a) an offence for which a pardon has been granted and has not been revoked or (b) an offence in respect of any provincial enactment. Applies only to criminal offences for which the worker has received a pardon and to any provincial offences (i.e. traffic offences)
      * Sex: section 10(2) tells us that sex discrimination includes pregnancy discrimination – the right to equal treatment without discrimination because a woman is or may become pregnant
        + *Brooks v Canada Safeway,* 1989

Found that employer’s disability benefit plan discriminated based on sex by denying certain benefits when inability to work was related to or coincided with pregnancy

The employer argued there was no violation of human rights legislation because the Act did not prohibit discrimination based on pregnancy. They also argued the plan treated all pregnant employee’s the same. Both arguments rejected by SCC on the basis that pregnancy and capacity for pregnancy were clearly linked to a persons’ sex

* + - * Sexual harassment: Now Acts expressly prohibit sexual harassment but the first cases of this nature were brought as complaints of sex discrimination.
        + *Jansen v Platy Enterprises*

SCC held 2 women sexually harassed by co-worker were victims of sex discrimination

Court recognized that sexual harassment places a burden on the shoulders of working women and that is linked to their sex

* + - * Sexual orientation, gender identity and gender expression: This ground has so far been held not to apply to personal fashion or grooming choices such as hairstyles or tattoos
      * Religion/creed: courts have applied the test of “sincerely held belief”. As long as the complainant holds a sincere belief that a practice or belief has a nexus to religion then would fall into this ground
* **Section 23(1)**
  + “The right … to equal treatment with respect to employment is infringed where an invitation to apply for employment or an advertisement in connection with employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination”
    - Employer cannot post an ad saying “only whites can apply” but it also means that employers need to avoid using gendered terms such as “waitress”. They also need to avoid asking discriminatory questions such as “Are you a Canadian citizen”. Instead they should ask “Are you legally entitled to work in Canada”.

## Human Rights Prohibitions against Discrimination in Hiring

* Discrimination at the hiring stage is very difficult to prove
* Tribunals have held that if the refusal to hire is based at least in part on discriminatory grounds, that is sufficient to find a violation of the Code. It does not need to be the only reason

### Haseeb v Imperial Oil Limited, 2018 HRTO 957

**Facts:** Imperial Oil had a program to recruit engineers and in order to be eligible for the program, applicants had to be able to work in Canada on a permanent basis meaning applicants had to either have permanent residence or Canadian citizenship. Imperial Oil required all applicants to provide proof of that. Employer’s rationale for this requirement was not intentionally discriminatory, but rather because of all the time, energy and expense that went into training and educating their new recruits and they wanted to be able to retain them with the hope that they would stay with the company and pursue senior positions. Mr. Haseeb was an international student in engineering at McGill and wanted to work in the energy sector. He was not a Canadian citizen, nor did he have PR. He was part of a special immigration project and he expected to attain a post graduate work permit (PGWP) for a fixed term of 3 years after graduating. He applied for the position and throughout the hiring process he lied about his inability to work in Canada on a permanent basis. He was offered the position and then when he could not provide proof of his eligibility to work in Canada permanently, Imperial Oil rescinded the offer. Haseeb had gotten the PGWP to work in Canada. When Imperial Oil took back the offer, Haseeb filed a human rights complaining citing discrimination on the basis of citizenship.

**Held:**  Employer’s permanence requirement discrimination on the basis of citizenship

**Reasons:** Tribunal noted that it was not a legal requirement for the work it was just the employer’s preference. Tribunal considered whether the requirement was a BFOR. First, they found that the BFOR defence was not available to Imperial Oil because this was a case of direct discrimination and not indirect or systemic discrimination because the employer’s requirement directly distinguished between applicants on the basis of citizenship. However, the idea that the BFOR defence is only available in cases of direct discrimination is questionable. In *Meiorin*, SCC held there is no difference between direct and indirect discrimination and that the same BFOR test should apply.

* Even if BFOR defence was available to the employer, it could not successfully establish the elements of a defence. Tribunal noted that Imperial Oil sometimes waived the permanence requirement so the employer could not establish that the permanence requirement was a necessary requirement for the job that could not be waived without causing undue hardship because they had waived.

## “Lookism”

* Should discrimination based on physical attractiveness be prohibited in hiring and employment under human rights legislation?
  + Some have suggested that if you are denied employment because of how you look you might be able to allege discrimination if you can link it to age, sex, ethnic background, disability or ancestry
  + Not a lot of case law about this issue in Canada yet
  + It really sheds light on the pigeon hole approach of human rights law – in order to establish discrimination you have to pigeon hold your claim into one of the prohibited grounds of discrimination. There is no analogous grounds language in the Code like there is in the *Charter.* You either have to fit yourself into one of the enumerated categories or challenge the *Code* as was the case in *Vrend* which read in sexual orientation as a prohibited ground in the *Alberta Human Rights Act*.

## Issues in Contract Formation

While this is a tort issue, contract law also has something to say about misrepresentation

* Issue here is the duties owed by employer and employee to each other during the hiring process including their communication during the application process including in their applications, resumes and interviews
  + If either party lies or misleads the other with respect to a material fact (i.e. a qualification employee claims to have) they may be liable in tort for damages. Tort usually referred to as tort of deceit, but also known as fraudulent misrepresentation.
  + Where the misrepresentation is not intentional, it may still be caught by the tort of negligent misrepresentation
  + If an untrue statement or misrepresentation induces the other party to enter the employment contract, the innocent party may seek to rescind the contract. The contract is treated as void and damages may be awarded to the wronged party to return them to the position they would have been in had the contract not been punitively formed. Innocent party may alternatively seek damages in tort. This would mean that they do not want the contract to be rescinded, instead, want to enforce it but claim damages they have incurred as a result of the misrepresentation

### Queen v Cognos, [1993] SCR 87

* Case involved negligent misrepresentation by the employer
* The tort of negligent misrepresentation dates back to the 1963 case of *Hedley Burn*

**Facts:** Queen had a job in Calgary when he applied for a job with the defendant, Cognos, a firm located in Ottawa. In the interview, Mr. Johnston, the company representative, told Queen that the job would involve working on a new project called the multi-view project. But, he did not disclose to Queen that the project had not yet been approved by the company and it was conditional on funding and that had not yet been guaranteed. Queen accepted the offer, resigned from his current position and relocated his family to Ottawa. The contract of employment that he signed with Cognos did retain the right to dismiss Queen for any reason with one month’s notice. It also gave Cognos the right to reassign him to some other project as needed. The funding allocated to the multi-view project had not come through and eventually after moving him around for 17 months Cognos decided to terminate Queen’s employment. Queen sued Cognos alleging the tort of negligent representation.

**Issue:** Does tort of negligent misrepresentation apply to pre-employment recruitment process? If so, had Cognos committed the tort by failing to disclose to Queen that the job for which he had applied was contingent on funding which had not yet been secured when offer was made?

**Held:** Damages awarded to employee for employer misrepresentation during job interview. Queen was successful in his action for the tort of negligent representation. He got $50, 000 for loss of income and just under $12, 000 for damages resulting from the purchase and sale of his new home, $250 for job search expenses, and an additional $500 in damages for mental distress because he had abandoned a secure job in

**Reasons:** SCC applied the *Hedley Burns* case to the pre-employment context.

* Does the tort of negligent misrepresentation apply to the pre-employment recruitment process?
  + SCC said yes, the tort of negligent misrepresentation applied to employment interviews
  + The court then set out the elements of the tort of negligent misrepresentation:

1. There must be a duty of care based on a “special relationship” between the representor (person making the representation) and the representee (person to whom the representation is made);
   * This criterion was met. Mr. Johnson, as a representative of the employer, speaking on behalf of Cognos, was in a special relationship with the job applicant such that a duty of care existed
2. The representation in question must be untrue, inaccurate, or misleading;
   * This element was also satisfied because the representation, an omission, was untrue. The position for which Queen was being considered was represented as available. There was no discussion that it was contingent on anything else.
3. The representor must have acted negligently in making the representation;
   * Employer argued that there had been no negligence because Johnson had been honest, and he testified that he honestly believed the project would go ahead and so when he did not tell Queen otherwise, he was not being deceitful
   * However, the court held that that was not the standard. Johnson knew that the project had not been approved and that approval was not guaranteed, and he did not tell Queen. Omission was negligent.
   * The court described the duty of care in this situation in the following terms “A duty of care with respect to representations made during pre-contractual negotiations is over and above a duty to be honest in making those representations. It requires not just that the representor be truthful and honest in their representations, it also requires that the representor exercise such reasonable care as the circumstances require to ensure that the representations made are accurate and not misleading”. Under this standard of care, Johnson failed to exercise such standard of care that the circumstances required of him in the making of the representations in the interview. He should not have led Queen to believe that the multi-view project was a reality when he knew that the most important factor to the existence of the project was financial support. By keeping the information to himself, Johnson left Queen with the false impression that the job was secure, and it did not matter that Johnston believed the project would be approved.
4. The representee must have relied, in a reasonable manner, on the negligent misrepresentation; and
   * It was arguable that in two respects that Queen’s reliance was not reasonable: (1) contract stated that Cognos would have the right to terminate Queen’s employment with 1 month notice and (2) there was a management rights provision in the contract that gave Cognos the right to manage the workplace and make necessary changes in the interests of efficiency and productivity. Employer argued that these provisions should have tipped off Queen his employment was not secure.
   * Neither of these arguments are persuasive. How Queen would view these provisions is affected by whether there had been a misrepresentation about the funding for the project. If he had known the funding was not secure, he may have been more apprehensive about signing a contract with a 1-month termination clause or a management right’s clause. The company cannot point to the contract provisions to establish that Queen’s reliance was unreasonable.
5. The reliance must have been detrimental in the sense that damages resulted.

* If so, had Cognos committed the tort by failing to disclose to Queen that the job for which he had applied was still contingent on funding which had not yet been secured at the time the offer was made?

**Note:**  The contract could have included a term which stated that the terms of the contract were paramount and would override any representations made in the interview or at any other point (“**entire agreement clause”**). However, courts are likely to require evidence that the employee knew or ought to have known about it’s existence and significance”.

**Note:** Not every representation made in the pre-employment context will be a misrepresentation. A misrepresentation is an untrue representation of fact. Therefore, an expression of a prediction or an opinion does not amount to misrepresentation even if it turns out to be wrong. However, if the prediction or opinion implies a fact, then there could be a claim for misrepresentation.

### Islip v Coldmatic Refrigeration

* Case involved fraudulent misrepresentation by employee (job applicant)
* Elements for negligent misrepresentation & fraudulent misrepresentation are the same except with the later there is intent to deceive
* While it is not uncommon for job candidates to embellish their resumes, if an applicant knowingly makes false representations that induce the employer to hire them it could amount to fraudulent misrepresentation

**Facts:** Coldmatic sought to hire Islip away from a competitor and Coldmatic offered Islip a 2 year contract which included the use of a truck and the right to purchase the truck for a nominal amount of about $1, at the end of the contract. During negotiations, Islip told Coldmatic that his salary at his current job was $75k year when in fact it was only $64k a year. Based on what Islip told them, Coldmatic offered him an annual salary of $75K. Islip accepts and begins working for Coldmatic. Coldmatic then takes back it’s promise to allow Islip to purchase the truck for $1. Islip claimed that this was a unilateral fundamental change to his employment and thus amounted to constructive dismissal. Islip sought damages for wrongful dismissal plus damages for the value of the truck. Coldmatic argued that Islip had committed fraudulent misrepresentation when he lied about his previous salary. Therefore, according to Coldmatic, Islip could not claim damages under the contract which he induced the employer to enter under false pretences.

**Issue:** Did Islip’s misrepresentation of his previous salary disentitle him to damages under the contract?

**Held:**  No, it did not disentitle him from relying on the contract. No damages for employee dishonesty during job interview before employer failed to establish reliance. Court ordered Coldmatic to pay Islip damages equal to 1 year salary because the contract entitled Coldmatic to terminate Islip’s contract after one year (this was the basis for the notice damage) plus $27, 500 to compensate Islip for lost value of the truck.

**Reasons:** While Islip had deliberately made a false statement about a fact with an intent to deceive Coldmatic, Coldmatic had not actually been induced to enter into the contract on the basis of that representation. They would have hired him anyway even if he had not lied. It was found that the employer could not establish reliance. The employer argued in the alternative that there was just cause for the dismissal and that therefore they did not have to provide notice and Islip had no basis for damages for notice. The court disagreed. The court found that the misrepresentation was not of such a serious nature as to afford grounds for dismissal without notice.

## Creation and Modification of the Contract of Employment

### Rejdak v The Fight Network, 2008 CanLII 37909 (ON SC)

* Written contract unsupported by fresh consideration

**Facts:** On Friday night, a representative from the Fight Network made an oral offer of employment over the phone to Rejdak. The terms of the offer included salary, the job title and the start date which was the following Monday. There was no discussion as to how much notice upon termination was required. Offer was made and accepted on that Friday. Rejdak quit his current job and began work at The Fight Network the following Monday. After his arrival on Monday, The Fight Network gave him a written contract and asked him to sign it. He took the contract home had returned it signed the following day. That written contract contained a provision that the employer could terminate Rejdak’s employment with no notice while he was on probation. The employer terminated the contract during the probationary period and did not give notice. Rejdak sued for wrongful dismissal, alleging that the employer had failed to give him the notice to which he was entitled under the contract. However, the employer’s view was that the provision in the contract regarding the probationary period meant Rejdak was not entitled to any notice. Rejdak argued that the original oral contract was the relevant contract not the written contract he signed after he began work. The first oral contract said nothing about notice of termination and that meant that the common law implied term of reasonable notice had not been rebutted. Rejdak’s argument was that he was entitled to common law notice of termination and that the 2nd written contract was not enforceable because he received no fresh consideration for giving up his earlier entitlement to reasonable notice.

**Held:** Rejdak was wrongfully dismissed and was entitled to reasonable notice in the amount equal to 4 months pay.

**Reasons:** Court found that there was an oral offer on the Friday which was accepted and there was no discussion of notice of termination or any probationary period so the terms of the Friday conversation represented the terms of the contract in place when Rejdak began work on the Monday. Court found that the written contract did not replace or amend the terms of the oral contract because the written contract, while offered and accepted, contained no consideration. Rejdak received nothing of value in exchange for giving up his right to reasonable notice and for agreeing to be subject to a probationary period. Employer did try to find some consideration by arguing that there were some benefits to Rejdak in the written contract that could amount to fresh consideration including (1) there was a term in the written contract which entitled him to 2 weeks vacation and that he could carry up to 1 week of that vacation into the next year if he did not use it and (2) there was a health benefit plan which Rejdak could participate in that was not discussed during the Friday conversation. The court found that neither of those amounted to fresh consideration. With respect to the vacation entitlement, the court said that it was not an additional benefit, it merely reflects what he was already entitled to under the *ESA* and the benefit plan was not fresh consideration either because it as just a standard benefit provided to all Fight Network employees and Rejdak could have reasonably have expected to be entitled to that once he accepted the offer. Therefore, the original oral contract was the relevant contract and none of the changes of the written contract were binding on the parties so Rejdak was therefore entitled to reasonable notice at common law and that had not been rebutted.

**Ratio:**

1. Amendments to an employment contract are enforceable only if there has been mutual consideration
2. Verbal offer by an employer can create a binding contract if accepted, does not have to be in writing
3. If an employee commences work before having signed a written contract of employment, the written contract represents an offer to modify the original implied contract unless the original offer of employment was made conditional on the signing of a written contract

**Note:** Things are up in the air because in 2015, the BCCA held that mutual consideration isn’t always required to support a modification as long as both parties agree to the change and as long as there is no duress or policy reasons not to treat the amendment as binding (*Rosas v Toka*)

### Globex Foreign Exchange v Kelcher, 2005 ABCA 419

* Restrictive covenant unsupported by fresh consideration
* This case dealt with whether continued employment on it’s own can constitute fresh consideration to support a modification or amendment to an employment contract

**Facts:** 3 employees signed contracts containing restrictive covenants.They were existing employees and were asked to agree to non-competition clauses that restricted their activities after their terms with the company. One of these employees signed the contract with the restrictive covenant provision at the beginning of their employment while the other two had signed the agreement after they were employed for some time. All three employees ended up leaving Globex and working for competitors.

**Issue:** Were the restrictive covenants enforceable or did they lack consideration?

**Prior Proceedings:** TJ said that the two employees who signed after starting work were not bound by the agreements because there was no fresh consideration given to them in exchange for them agreeing to these post employment conditions.

**Employer’s Argument:** On appeal, the employer argued that continued employment of these two workers was consideration.

**Held:** Restrictive covenants not enforceable for lack of fresh consideration.

**Ratio:** Mere continued employment does not provide consideration for the new terms. Fresh consideration is required for modification of the employment contract. A failure to give notice of termination as required by the contract disentitled the employer from relying on a restrictive covenant in that contract.

**Reasons:** Employer is required to continue the relationship until there are grounds for dismissal or reasonable notice of termination is given.

**Dissent:** The employer’s agreeing to forebear from exercising it’s right to terminate an employee had be consideration for an amendment to the employment contract. The employer always has the right to terminate the contract with sufficient notice so long as it is not for discriminatory reasons. The employer impliedly agreed to forebear from lawfully terminating the relationship with notice in exchange for the employee’s expressly agreeing to the new restrictive covenant. The dissent also went further and questioned the whole need for the consideration inquiry in the first place as courts should not bend over backwards to find agreements between the parties, when the parties believe them to be enforceable, to not be enforceable because of the doctrine of consideration. In this case, the employer and all the employees thought the contracts were enforceable. There was disagreement as to whether they had been reached but the parties acted as though they believed to be bound by them. The dissent said that in applying the law of consideration, the court should refrain, if possible, from relieving the parties of covenants freely entered into absent some overriding public policy consideration. In this case, for the dissent, the court should relax the requirements for consideration on the basis that the parties had clearly intended to be bound by the covenant. The dissent urged that the evidence of the parties intentions should trump the technical requirements of contract formation and modification.

* The court was also split on the issue of whether an employer who has been found to have wrongfully dismissed an employee cam nonetheless rely on the employment contract, even though the employer has breached the term of being required to give notice.
  + Majority – upheld the current state of the law which says no, an employer who has wrongfully dismissed an employee and has therefore breached a term of the contract they cannot then turn around and rely on other terms of the contract. Said that there would be too much potential of abuse by employers. They would have held that the employer could not have relied on the covenant even if there had not been a problem with consideration
  + Dissent – Just because the employer had breached the contract, that does not give the employee the right to breach the contract. The consideration problem should not have rendered the covenant unenforceable nor should have the fact that the employer breached the contract by wrongfully dismissing the employees have rendered the contract unenforceable.

### Lancia v Park Dentistry, 2018 ONSC 751

* Notice eliminates need for fresh consideration

**Facts:** This case involved a constructive dismissal claim and part of the claim was based on claims of sexual harassment, but the court found those to be unsubstantiated. The employer wanted to transition all employees to written contracts, so the employer gave reasonable notice of this change. All employees were given written contracts to review and were given over a month to consider them. Lancia signed it within 2 days. The employer, in addition to giving them 18 months notice of the implementation of the new written contract also gave everyone who signed onto the new written contract a signing bonus of $2,000.

**Ratio:** Where an employer unilaterally changes the terms and conditions of employment without the employee’s consent and with or without fresh consideration the employee may claim constructive dismissal. An employer can impose changes and avoid a claim of constructive dismissal if the employer gives sufficient notice of the changes. Sufficient notice will depend on whatever is required to terminate the relationship because the employer is essentially lawfully terminating one contract with notice and offering a new one. There is therefore no need for fresh consideration for the changes because it is essentially a whole new contract.

**Held:** Employee was unsuccessful in her claim of constructive dismissal. She was given 18 months notice of her new written contract by her employer and was given more than a month to review the contract and there was additional consideration for the new contract in the form of a signing contract even though that was not necessary because the employer gave reasonable notice of the changes.

**Note:** Constructive dismissal is a form of wrongful dismissal and essentially you are saying that the unilateral change brought the contract to an end and if no notice was given for bringing the contract to an end then it may be a wrongful dismissal. What makes it a constructive dismissal is that it is the employee’s resignation in response to the employer’s unilateral changes that brings the contract to an end.

**Reasons:** If the written contract were just a modification of the existing oral contract the signing bonus could be fresh consideration, but it was not even necessary because of the notice.

## Overview of the Ontario *Employment Standards Act*, 2000

* “In their inception in the United Kingdom, early in the Industrial Revolution, labour standards reflected widespread public sentiment, given force by legislation, that no employer should be allowed to impose, and no worker should be obliged to endure, working conditions that fell below the standard that a decent society would tolerate.”
  + Harry Arthurs, “*Fairness at Work: Federal Labour Standards for the 21st Century”* (2006)
  + The objective of the legislation, such as employment standards, is to ensure that no matter how limited a worker’s bargaining power is, they should not be compelled to work under conditions most workers would not consider decent or minimally fair
* The *ESA* applies to all provincially regulated employers in Ontario. Federally regulated employees are regulated by Part III of the *Canada Labour Code*
* SCC has characterized the *ESA* as remedial in nature and the court has said that it must therefore be interpreted broadly and generously in favour of employees. In *Rizzo v Rizzo Shoes* (1998), the SCC held that the termination and severance provisions need to be interpreted broadly and generously such that those benefits were also payable to employees who lost their positions as a result of the employer’s bankruptcy
* The *ESA* works by restricting freedom of contract with respect to certain aspects of contracts of employment

#### No Contracting Out

* **5(1)** Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.
  + An employee cannot waive or be pressured by an employer to waive their rights under the Act (*Machtinger)*

#### Greater Contractual or Statutory Right

* **5(2)** If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply
  + The parties can agree to greater entitlements or greater employee benefits than those under the Act
  + This greater right will prevail over the statutory minimum

#### Other Provisions

* **When civil proceeding not permitted**
  + **97(1)** An employee who files a complain under this Act with respect to an alleged failure to pay wages or comply with Part XIII (Benefit Plans) may not commence a civil proceeding with respect to same matter
* **Same, wrongful dismissal**
  + **(2)**  An employee who files a complaint under this Act alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment
* **Amount in excess of order**
  + **(3)** Subsections (1) and (2) apply even if,
    - **(a)** the amount alleged to be owing to the employee is greater than the amount for which an order can be issued under this Act; or
    - **(b)** in the civil proceeding, the employee is claiming only that part of the amount alleged to be owing that is in excess of the amount for which an order can be used under this Act
* **Withdrawal of complaint**
  + **(4)** Despite subsections (1) and (2), an employee who has filed a complaint may commence a civil proceeding with respect to a matter described in those subsections if he or she withdraws the complaint within 2 weeks after it is filed
* **When complaint not permitted**
  + **98 (1)** An employee who commences a civil proceeding with respect to an alleged failure to pay wages or to comply with Part XII (Benefit Plans) may not file a complaint with respect to the same matter or have such a complaint investigated
* **Same, wrongful dismissal**
  + **(2)**  An employee who commences a civil proceeding for wrongful dismissal may not file a complaint alleging an entitlement to termination pay or severance pay or have such a complaint investigate if the proceeding and the complaint relate to the same termination or severance of employment

#### Interpretation of Employment Standards Legislation

* A lot of important details are found not in the Act itself but in the *Regulations* which are used in statute drafting to fill in the details of how the legislation will actually function, who it covers and who it does not
* Look at *Regulations* for exemptions and qualifications or how the rule in the statute is to be applied
* The cue to look at the *Regulations* are the words “as prescribed”

## Wage, Hours of works, Leaves of Absence

#### Bill 148: The Fair Workplaces, Better Jobs Act 2017

* Proposed by Liberal Government
* Included key changes to several pieces of labour and employment legislation. For the *ESA* it included minimum wage increases, changes to the rules about scheduling on call employees, increases to vacation entitlements to employees with 5 or more years of service and an increase to personal emergency leave entitlements
* Prioritized the needs of employees
* Liberal government included a pretty large increase to minimum wage in this Bill.

#### Bill 47: The Making Ontario Open to Business Act 2018

* Proposed by the Conservative Government
* Undid much of Bill 148 as far as employment standards legislation is concerned.
* Prioritized the needs of business
* The last part of the increase, the jump from $14 to $15 was cancelled. The Conservative government announced a freeze on minimum wage until October 1, 2020 when increases would occur but they would just be tied to inflation

#### Minimum Wage Provisions of *ESA*

* **Minimum Wage**
  + **23(1)** An employer shall pay employees at least the minimum wage.
    - This is the lowest hourly wage that an employer can pay an employee
* **Determination of minimum wage**
  + **23.1(1)** The minimum wage is the following:

1. On or after January 1, 2018 but before October 1, 2020, the amount set out below for the following classes of employees:
   1. For employees who are students under 18 years of age, if the student’s weekly hours do not exceed 28 hours or if the student is employed during a school holiday, $13.15 per hour
      1. This will go up to $13.40 on October 1
   2. For employees who, as a regular part of their employment, serve liquor directly to customers, guests, members or patrons in premises for which a license or permit has been issued under the *Liquor License Act* and who regularly received tips or other gratuities from their work, $12.20 per hour
      1. This will to $12.45 an hour on October 1
   3. For the services of hunting and fishing guides, $70.00 for less than 5 consecutive hours in a day and $140 for 5 or more hors in a day, whether or not the hours are consecutive
   4. For employees who are homeworkers, $15.40 per hour
   5. For any other employees not listed in subparagraphs i to iv, $14.00 per hour

* Arguments for and against the increasing of minimum wage:
  1. Some warned the increase by the Liberal government could result in a loss of jobs, especially for younger workers
  2. There were also suggestions that increases to minimum wage do not result in the greatest benefit to lo income families with most of the benefit going to families who were already above the low income threshold
  3. Others have said that boosting minimum wage boosts the economy which benefits everyone and that increasing minimum wage helps to address wage inequality since more than half of those earning minimum wage are women and 1/3 are racialized workers
  4. **Regulation 285:** Exemptions from minimum wage and other standards

#### Annual Adjustment

* **23.1(4)** On October 1 each year starting in 2020, the minimum wage that applied to a class of employees immediately before October 1 shall be adjusted as follows:
  1. Previous wage x (Index A/Index B)= Adjusted Wage in which,
     + “previous wage” is the minimum wage that applied immediately before October 1 of the year,
     + “Index A” is the Consumer Price Index or the previous calendar year,
     + “Index B” is the Consumer Price Index for the calendar year immediately preceding the calendar year mentioned in the description of “Index A”, and
     + “Adjusted wage” is the new minimum wage

#### Equal Pay for Equal Work (Wage Discrimination)

* **42(1)** No employer shall pay an employee of one sex at a rate of pay less than the rate paid to an employee of the other sex when,
  1. They perform substantially the same kind of work in the same establishment;
  2. Their performance requires substantially the same skill, effort and responsibility; and
  3. Their work is performed under similar working conditions
* **(2) Exception** Subsection (1) does not apply when the difference in the rate of pay is made on the basis of,
  1. A seniority system;
  2. A merit system;
  3. A system that measures earnings by quantity or quality of production or
  4. Any other factor other than sex
* This is not pay equity – pay equity focuses on comparing different kinds of work and ensuring equity and fairness across different kinds of work. Equity is therefore equal pay for work of equal value while the *ESA* is concerned with equal pay for the same or substantially the same work based on the gender of the worker
* With Bill 148, the Liberal government sought to take this provision further and to also prohibit discrimination based on employee status which is whether the employee was full time, part time, on a fixed term contract, casual or seasonal. Where the work requires the same skill, effort, responsibility and working conditions under Bill 148 the employer would be prohibited from paying different wage rates
* Bill 47 completely repealed these changes so employer can choose to pay employees different wag rates depending on the employee’s status which gives the employer a lot more flexibility to reduce labour costs such as hiring seasonal workers to do the work of full time employees.

#### No Treating as if Not Employee

* **5.1(1)** An employer shall not treat, for the purposes of this Act, a person who is an employee of the employer as if the person were not an employee under this Act
* **(2)** REPEALED: 2018, c. 14, Sched, 1, s.3
  + **Bill 148 protections for** on-call workers**: 3 hours pay and notice of scheduling changes** was repealed by Bill 47
    - Bill 148 also implemented the right of a worker to refuse to be on call if the eployer did not give at least 96 hours’ notice of the on call period.
  + Bill 148 required that the onus be on the employer to prove that the worker was not an employee and that thus the *ESA* did not apply.
    - Bill 47 also took this provision away
  + If employers amended the contract in response to Bill 148 in order to reflect those minimum on call requirements, the employer cannot now change the employment contract to take those out now that they are no longer in the act. To change the contract of employment, the employer must ensure the changes are not unilateral and that they are supported by fresh consideration. Just because the Act no longer sets a minimum standard with respect to a particular area that does not relieve an emplor from whatever it has agreed contractually to be bound to. The common law rules with respect to contraction formation and modification still apply.

#### Personal Emergency Leave, after Bill 47

* Bill 148 gave to all employees 10 unpaid personal emergency leave days per year including 2 paid days per year if the employee had been employed for at least 1 week.
* Personal emergency leave is available to all employees regardless of the size of the workplace (before it was limited to workplaces with at least 50 employees)
  + Bill 47 then came along and changed all of this, specifically it divided the personal emergency leave days intwo three different kinds of leave and specified an entitlement for each
    - 3 days for “sick leave” (personal illness, injury or medical emergency)
    - 3 days for “family responsibility leave” (illness, injury, medical emergency or other urgent matter concerning prescribed individuals)
    - 2 days for “bereavement leave” (related to the death of prescribed individuals)
  + There are additional leaves available under the Act which can be found in Part 14
    - One of these leaves which predated Bill 148 that was not repealed by bill 47 is domestic or sexual violence leave which is leave for an employee who has been employed for at least 13 consecutive weeks, they will been entitled up to 10 individual days and up to 15 weeks of unpaid leave if the employee or the employee’s child experiences domestic or sexual violence or the threat of same - **section 49.6**
    - Some other leaves include pregnancy leave parental care leave etc.
  + There is a new leave, “infectious disease emergency leave” which is in response to COVID-19 which applies when the government declare an infectious disease emergency and the employee is unable to work because they are being treated for the disease, are being quarantined or isolated or they are providing care to specified individuals who are affected directly or indirectly by the disease (indirectly can include school/daycare closures and travel restrictions)
    - This is an unpaid leave and the length depends on how long the disease affects the employee’s ability to return to work and as long as COVID-19 remains designated by the government as an infectious disease
    - Employers can request reasonable evidence of the need for the leave but they cannot insist on a doctors note to justify the leave

#### O. Reg.228/20 Infectious Disease Emergency Leave

* An employee whose employer has temporarily reduced or eliminated their hours f work for reasons related to COVID-19 is deemed to be an infectious disease emergency leave
* An employee is not considered to e laid off if their employer temporarily reduced or eliminated their hours of work or wages for reasons related to COVID-19
* And the employee is not considered to be constructively dismissed under the *ESA* if the employer temporarily reduces or eliminates hours of work or wages because of COVID-19
* These provisions mean that many employees will find themselves on an unpaid leave of absence and not entitled to termination or severance pau even if their work is completely or very substantially reduced. Deeming the employees to be on leave removes the obligation of employers to provide the employee with termination or severance pay
* However, nothing in these changes affect the employee’s rights at common law
  + Being deemed to be on an unpaid leave does not mean that the employee could not sue for constructive dismissal and seek damages for notice of termination at common law

## Termination and Severance

* The term “***reasonable notice”*** is synonymous with common law notice
  + What is reasonable depends on the facts the courts have recognized
* “Notice of termination” is the language that the *Act* uses
  + This means the notice specified under the legislation
* Severance pay: any kind of payment that an employer makes to an employee upon severing their relationship. Common law damage for reasonable notice are sometimes referred to as severance.
  + Severance pay is an entitlement that is available to certain employees in limited circumstances on top of notice of termination

#### Employment Standards Act Provisions

* **54 – No termination without notice** 
  + No employer shall terminate the employment of an employee who has been continuously employee for three months or more unless the employer,
    - (a) has given to the employee written notice of termination in accordance with section 57 (amount of notice) or 58 (mass terminations) and the notice has expired; or
    - (b) has complied with section 61
  + There is no entitlement to notice of termination during the first 3 months of employment. This suggests that the *ESA* recognizes a probationary period during which the employer can assess the employee’s ability to perform the job and their suitability for the position without any liability for terminating the position within those first few weeks
* **55 – Prescribed employees not entitled**
  + Prescribed employees are not entitled to notice of termination or termination pay under this Part
    - Must look at the Regulations to find out who is prescribed and therefore exempt from the notice of termination provisions
* **61 – Pay instead of notice**
  + **(1)** An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 if the employer,
    - **(a)** pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section; and
      * An employee who receives working notice cannot insist of pay in lieu of notice. If the employee refuses to work during the notice period it is possible that the employee may be found to have resigned so the employee would be the one terminating the relationship which would relieve the employer of the obligation to provide notice or pay in lieu of notice
    - **(b)** continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive
* **57 – Employer notice period**
  + The notice of termination under section 54 shall be given,
    - (a) at least one week before the termination, of the employee’s period of employment is less than one year;
    - (b) at least two weeks before the termination, if the employee’s period of employment is one year or more and fewer than three years;
    - (c) at least three weeks before the termination, if the employee’s period of employment is three years or more and fewer than four years;
    - (d) at least four weeks before the termination, if the employees’ period of employment is four years or more and fewer than five years;
    - (e) at least five weeks before the termination, if the employee’s period of employment is five years or more and fewer than six years;
    - (f) at least six weeks before the termination, if the employee’ period of employment is six years or more and fewer than seven years;
    - (g) at least seven weeks before the termination, if the employee’s period of employment is seven years or more and fewer than either years; or
    - (h) at least eight weeks before the termination, if the employee’s period of employment is eight years or more.
* **O. Reg. 288/01: TERMINATION AND SEVERANCE OF EMPLOYMENT** 
  + Employees not entitled to notice of termination or termination pay
    - **2(1)** The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:

1. Subject to subsection (2), an employee who is hired on the basis that his or her employment is to terminate on the expiry of a definite term or the completion of a specific task
   1. Reasoning for this is that you don’t need notice of termination when you have a fixed term contract. The parties know at the outset of the relationship when it will come to an end
2. An employee on a temporary lay-off
3. An employee who has been guilty of willful misconduct, disobedience or willful neglect of duty that is not trivial and has not been condoned by the employer
   1. This is the statutory equivalent of the common law just cause.
   2. When an employer has just cause at common law, the employer does not have any oblation to provide reasonable notice to the employee

### Oosterbosch v FAG Aerospace Inc, 2011 ONSC 1538

**Facts:** Mr. O was dismissed by the employer after 19 years of full-time employment. The employer’s position was that there was just cause for the termination and that therefore, the employer did not provide either working notice or pay in lieu of notice. The employer relied on it’s progressive discipline policy to establish just cause. The employer pointed to several warnings for poor performance and for lateness and the fact that Mr. O’s performance on either of these did not improve.

**Issue:** Did the employer have just cause to dismiss Mr. O without providing either contractual or statutory notice?

**Held:** Employer did satisfy the common law standard of just cause based on a cumulative pattern of poor performance and lateness. However, based on the reasons below, Mr. O was entitled to termination and severance pay under the Act.

**Reasons:** The court said that there had been sufficient warnings and there had been no improvement in response to those warnings so the employer had no obligation at common law to provide notice or pay in lieu of notice. However, the court also found that Mr. O’s cumulative record of poor performance and lateness did not rise to the level of willfulness as required under the legislation (Regulation outlined above) in order to disentitle him from statutory notice and severance pay.

* “It is my opinion that the plaintiff demonstrated a sustain course of casual and carless conduct that was inconsistent with the continuation of his employment, but I do not accept the defendant’s submission that his conduct was willful. All of the leaders who testified indicated that the plaintiff was an experienced, competent machine operator with an apparent attitude problem, but none suggested his misconduct was intentional…. He was undoubtedly careless, and the persistence of the carelessness justified his dismissal. I would not, however, characterize his offending behaviour as “willful misconduct, disobedience or willful neglect of duty” that would disentitle him to receipt of termination and severance payments under the provisions of the *Employment Standards Act*”

**Ratio:** An employer may have just cause to terminate without notice or severance under the Act but the standard is higher than it is at common law. Under the Act, it is necessary to find that element of intentional wrongdoing, the “willful misconduct”.

#### Mass Termination *ESA* Provisions

* The *ESA* sets out special rules for notice of termination that may apply when the employment of 50 or more employees is terminated within a 4-week period (referred to as a mass termination). Section 58 deals with mass terminations.
* **58 – Notice, 50 or more employees**
  + **58(1)** Despite section 57, the employer shall give notice of termination in the prescribed manner and for the prescribed period if the employer terminates the employment of 50 or more employees at the employer’s establishment in the same four-week period.
    - The term “prescribed” in this subsection is our cue to look in the Regulations
  + **(2)** An employer who is required to give notice under this section,
    - **(a)** shall provide to the Director the prescribed information in a form approved by the Director; and
      * Director here is the Director of Employment Standards at the Ministry of Labour
    - **(b)** shall, on the first day of the notice period, post in the employer’s establishment the prescribed information in a form approved by the Director
  + **(3)** The information required under subsection (2) may include,
    - **(a)** the economic circumstances surrounding the terminations;
    - **(b)** any consultations that have been or are proposed to take place with communities in which the termination will take place or with the affect employees or their agent in connection with the terminations;
    - **(c)** any proposed adjustment measures and the number of employees expected to benefit from each; and
    - **(d)** a statistical profile of the affected employees
  + **(4)** The notice required under subsection (1) shall be deemed not to have been given until the Director receives the information required under clause 2(a)
* **O. Reg. 288/01: TERMINATION OF EMPLOYMENT**
  + **3.(1)** The following periods are prescribed for the purposes of subsection 58(1) of the Act:

1. Notice shall be given at least eight weeks before termination if the number of employees who employment is termination is 50 or more but fewer than 200
2. Notice shall be given at least 12 weeks before termination if the number of employees whose employment is terminated is 200 or more but fewer than 500
3. Notice shall be given at least 16 weeks before termination, if the number of employees whose employment is terminations is 500 or more.

### Wood v CTS of Canada Co, 2018 ONCA 758

**Facts:** The company had advised a group of 77 employees in a letter dated April 17, 2014 that their employment would be terminated on March 27, 2015. Later, the termination date was extended to June 28, 2015 for most of these employees. However, the company failed to file and post the Form 1 until May 12, 2015 which was eight weeks prior to the termination date. The case involved a class action that was brought on behalf of several employees against the company. The employees claimed that the notice period could not commence until the Director had received the form.

**Prior Proceedings:** SCJ found in favour of the severed employees and confirmed that the working notice provided prior to the delivery of the Form was ineffective. The court said that the *ESA* mass termination provisions which required the employer to serve notice and post the form of notice on the same day that it provides the notice to the employees.

**Issue:** How do you determine notice entitlements where there is a mass termination? Also, what constitutes working notice?

**Held:** ONCA overturned the lower court analysis of the Form.

**Reasons:**

* CA said that an employer is only required to serve and post the Form at the beginning of the statutory period of notice.
* “The purpose of the *ESA* is to protect the interests of employees by requiring employers to comply with certain minimum standards... not to impose requirements on employers in excess of the statutory minimums.”
  + Here, eight weeks-notice is what was statutorily required but since the company failed to serve and post the Form at least 8 weeks prior to the termination date, the employees were entitled to pay in lieu of notice for the balance of the statutory notice period.
* Both SCJ and ONCA thought that parts of the working notice period should be invalidated since some of the employees had worked excess overtime hours during this notice period which was in violation of the *ESA.*
  + Court found that this notice was in violation of the Act because it failed to consider the quality of the employee’s opportunity to find alternative employment
  + Working notice had a “significant adverse effect on the ability of the employee to look for new employment.”

#### Entitlement to Severance Pay

* **64(1)** An employer who severs an employment relationship with an employee shall pay severance pay to the employee and if the employee was employed by the employer for five years or more and,
  + **(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)** the employer has a payroll of $2.5 million or more
* Regulation 288 has a similar exception for severance pay on the basis of the employee’s willful misconduct
* **65(1) – Calculating Severance Pay**
  + Severance pay under this section shall be calculated by multiplying the employee’s regular wages for a regular work week by the 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 2
    - \*notice here there is no cap where as with notice of termination there was\*

## The Contract of Employment: Express, Ancillary, and Implied Terms

## Interpretation of Express Terms

#### Express terms are those that are expressly agreed to by the parties whether in writing or orally

## The Contract of Employment: Principles of Interpretation

* The parole evidence rule
  + Concerns the interpretation of contractual terms generally
  + Where a contractual term is unambiguous (only capable of one reasonable meaning), the parole evidence rule applies
  + This is a rule that prevents the parties from adducing external evidence to support a different interpretation of the contractual language
    - They cannot point to something outside of the contract (i.e. an oral representation) to support a different interpretation from which is clearly and expressly stated in the contract
  + In other words, a court is limited to the text before it and must stay within the 4 corners of the contract (this is where there is clearly only one reasonably interpretation of the language)
  + Where a written contract or contractual term is ambiguous (capable of multiple interpretations) a court may welcome evidence about what the parties intended the contractual language to mean such as what the parties said during negotiations, how the contract has been applied in the workplace etc.
  + So, contract ambiguity creates an exception to the parole evidence rule
* *Contra proferentem*
  + Another rule that applies to the interpretation of ambiguous contract terms
  + This rule states that where a contract term is ambiguous (capable of multiple reasonably interpretations), the court will adopt the interpretation that is most favorable to the party that did not draft the ambiguous term (it construes the ambiguity against the drafter of the language). This is usually the employer
* *Machtinger v HOJ Industries*
  + Courts often point to special features of the employment contract to justify an interpretation or a holding in favour of employees. They often point to the inequality of bargaining power between most employers and employees and the general vulnerability of employees.
  + *Machtinger* illustrates the judicial approach to the employment relationship which is mindful of the vulnerability of employees especially on termination and therefore adopts an approach that protects the employee and incentivizes employers to look out for employees in a manner that is consistent with their relationship as contracting parties
  + Generally, courts have held termination clauses to a very high standard insisting that they very clearly address all the employee’s entitlement upon termination under the *Act*

#### Termination Provisions

* These are terms in the contract that specify how much notice is required to terminate the employment contract (main issue here is whether the term is enforceable or not)

### Wood v Fred Deeley (2017, ONCA)

**Facts:** Julia Wood was offered the position and accepted on the phone on April 17th. Later that day, the employer emailed her a copy of the contract of employment. Her first day of work was April 23rd and on April 24th she signed a written copy of the contract of employment that was emailed to her. The contract contained the following termination clause: *“[The company] is entitled to terminate your employment at any time without cause by providing you with two 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”.* Her employment was later terminated and even though the employer paid her a severance package of sorts, employer thought owed in virtue of this termination clause, she brought a common law action for reasonable notice. The employer actually paid her more than what the clause required they gave her 21 weeks of pay lieu of notice and she claimed that she was entitled to reasonable notice which was in the rage of 12 month’s pay and that the employer owed her the difference between that and what it had paid her.

**Employee’s Arguments:** She had two arguments: (1) that the whole contract was unenforceable and (2) that the termination provision (outlined above) was unenforceable. The conclusion of either argument is that she would have been entitled to reasonable notice at common law because there would have been no enforceable written contract or at least no termination provisions in the contract to rebut the common law presumption of reasonable notice.

**First Issue:** The written contract that she received on her 2nd day of work represented a modification of the contract because the contract had already been formed by that point. The argument goes that without fresh consideration, the contract is not enforceable. Doctrine of consideration requires the employer to provide something new of value to the employee if the employer wishes to obtain a new contract or to introduce a new term into the contract that negatively affects the employee’s interests such as the introduction of a termination clause. Where an employee has already begun working for the employer, they may take the position that an unwritten contract has already been formed and that no fresh consideration was given in exchange for the new contract once it was introduced after the employee commenced work or in this case after she accepted the offer over the phone. Absent fresh consideration, this new contract is unenforceable. *Rejdak* tells us that an introduction of a foreign contract after the contract had been formed or the modification of an existing written contract must be supported by fresh consideration.

* However, in this case, the CA disagreed with this approach. Instead, the CA held that a written contract is not unenforceable merely because the employee signs it after they start work. As long as the material terms of the contract were part of the original employment relationship (key terms were communicated prior to the commencement of work), there was no fresh consideration needed to introduce those terms into the contract. The fact that she signed the contract after she started working for Deeley was “a matter of administrative convenience” and did not affect the enforceability of the contract.

**Second Issue:** Wood argued that the termination clause improperly excluded the employer’s statutory obligation to make benefit contributions during the notice period and to pay severance pay. In it’s defence, the employer argued that the word “pay” in the phrase (2 weeks’ notice of termination or pay in lieu thereof) was broad enough to include both wages and benefits so it did not represent an attempt to contract out of the act. The employer also argued that the 21 weeks of pay in lieu of reasonable notice that it actually paid to Wood exceed her entitlements under the *ESA* so she actually ended up with more than what the Act would have entitled her to even though the contract did not entitle her to do that.

* CA agreed with Wood on this issue and agreed that the employer had improperly tried to contract out of the *ESA*. The court said that the word “pay” was at best ambiguous and so applying the doctrine of *contra proferentem*, they adopted an interpretation that was more favorable to Wood. The court concluded that pay referred only to wages and did not include benefits. Court said that termination clause was also deficient because the employer had combined it’s separate obligations to give notice and to pay severance pay. In the result, the clause permitted the employer to discharge all its statutory obligations by way of working notice. Wood would have received more notice than she was entitled to under the *ESA* but she never received any severance pay. This is because notice can be given as working notice but severance pay cannot because it is a lump sum payment. The contract of employment referring only to notice failed to entitle her to severance pay and as such permitting the employer to convert severance pay into a provision for working notice. The employer did not actually do this but on one interpretation that clause would permit it. Construing the clause against the employer meant reading it this way which would violate the Act by permitting severance pay to be the same as notice of termination such that the clause is void for violating the Act. The clause being void means the parties have not rebutted the common law entitlement to reasonable notice and therefore, Wood could succeed in her claim for common law damages for wrongful dismissal.
* Here, the employer’s actual compliance with the *ESA* did not cute the clauses deficiencies and an unlawful clause cannot be remedied after the fact.
* *Machtinger* tells us that the effect of an unlawful contract clause would be to entitle the employee to a much greater common law damages.

**Held:** Employer was ordered to pay damages equal to 9 months of reasonable notice at common law

### North v Metaswitch Networks (2017, ONCA)

**Facts:**  The employee was paid both a fixed salary and commissions. He was dismissed on a without cause basis and there was dispute about what he was owed. Was he owed what the contract purported to provide or was he owed something more in the way of common law damages for reasonable notice.

**Relevant Clause in Contract** – Termination of Employment

* (c) Without Cause- The Company may terminate your employment at any time it 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 it’s share of all [sic] 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 out 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. [emphasis added]

**Employee’s Argument:** Employee argued that the termination provision was void because of the bolded part above because it breached the *ESA* by expressly limiting payment of wages to being based on Base Salary only and excluding his commissions which fell below the provisions of the *ESA* for notice.

**Prior Proceedings:** Trial judge found that the provisions did violate the *ESA* but went on to find that nonetheless, that part of the clause could be severed from the rest of the contract because of the severability clause. Section 17 (a) of the Agreement stated, *“If any part of the Agreement is found to be illegal or otherwise unenforceable by any court of competent jurisdiction, that part shall be severed from this Agreement and the rest of he Agreement’s provisions shall remain in full force and effect”*. The lower court relied on this provision in the contract and struck out the last part of the clause that referred to payments being based on only Base Salary and left the rest of the contract in tack.

**Held:** CA disagreed with the lower court.

**Reasons:**

* “… where a termination clause contracts out of one employment standard, the court is to find the entire termination clause to be void, in accordance with s. 5(1) of the ESA. It was an error in law to merely void the offending portion and leave the rest of the termination clause to be enforced.”
  + This meant that the whole clause was void and the employee in this case could therefore claim common law damages for reasonable notice
* “The problem with this approach is that, to the extent that it effectively rewrites or reads down the offending provisions, it has the very effect referred to by Iacobucci J. in *Machtinger*- employers will be incentivized to contract out of the *ESA* but include a severability clause to save the offending provision in the event that an employee has the time and money to challenge the contract in court.”
  + CA has made it clear that it holds employers toa high standard when it comes to showing that they have lawfully rebutted the presumption of common law notice and they cannot rely on a severability clause to help them because it defeats the point of providing employers an incentive to complying with the Act at the outset.

### Nemeth v Hatch (2018, ONCA)

**Facts:** Employee with 19 year service and was dismissed with 8 weeks’ notice of termination and 19.5 weeks salary as severance pay. Employer also continued benefits through statutory notice period. Employee sued for wrongful dismissal alleging that this provision did not rebut the common law presumption of reasonable notice.

**Relevant Provision in Contract:** The Company’s policy with respect to termination is that employer 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.

**Prior Proceedings:** Superior Court disagreed with the employee. They held that the contractual term was binding and that no further damages were owing. The employee appealed and argued that because the clause did not mention his severance entitlement it represented an attempt to contract out of the Act and the employee should therefore be able to claim common law damages.

**Held:** Disagreed with the employee.

**Reasons:** This case was unlike *Wood v Frank Deeley*. CA pointed to it’s earlier decision in *Roten v Toronto Humane Society* where a termination clause was silent with respect to termination of benefits and the court held that it did not violate the ESA as the employer was still obligated to continue the employee’s benefits and abide by the Act. The failure to mention that the employer was required to continue to provide the benefits during the notice period did not render the term void. CA followed this reasoning and said that the silence and the termination clause with respect to severance pay entitlement did not amount to contracting out of the *ESA*. However, the court did find that the clause was ambiguous as it could give rise to 2 interpretations: one that would limit the employee’s notice entitlement to the ESA entitlement (capped at 8 weeks) and one which would provide 19 weeks’ notice where the provision specified a 4 week minimum but no maximum. The CA construed this ambiguity against the employer and held that the interpretation that provided the more generous entitlement to the employee was to be adopted.

* While the termination provision was not struck down, it was read in such a way that the employee was entitled to more.
* The employer had paid 8 weeks, but the contractual language had supported an interpretation which entitled the employee to more than this (1 week per year of service with no upper limit) which would entitle the employee to 19 weeks.

**Held:**  Employer was order to pay an additional 11 weeks pay.

### Rossman v Canadian Solar (2019, ONCA)

**Facts:** Rossman was terminated after 3 years of employment on a without cause basis. The dispute arose as to his entitlements under the contract. The dispute was about the benefit provision. The employee claimed that it contravened the notice provisions of the *ESA*. The employer argued that it complied with the *ESA* because it provided a greater benefit to Mr. Rossman’s specific circumstances because although he was only entitled to 3 weeks’ notice under the *ESA* based on service, the provision provided him with 4 week’s notice.

**Relevant Contractual Provision:** 9. Termination of Employment

* 9.01 – The parties understand and agree that employment pursuant to this agreement may be terminated in the following manner in the specified circumstances: …
  + (c) by the Employer, after the probation period, it its absolute discretion and for any reason on giving the Employee written notice for a period which is the greater of:
    - (i) 2 weeks, or
    - (ii) in accordance with the provisions of the *ESA* or other applicable legislation, or on paying to the Employee the equivalent termination pay in lieu of such period of notice. The payments contemplated in this paragraph include all entitlement to either notice or pay in lieu of notice and severance pay under the *ESA*. **In the event the minimum statutory requirements as at the date of termination provide for any greater right or benefit than that provided in this agreement, such statutory requirements will replace the notice or payments in lieu of notice contemplated under this agreement.** The employee agrees to accept the notice or pay in lieu of notice as set out in this paragraph as full and final settlement of all amounts owing by the Employer on termination, including any payment in lieu of notice of termination, entitlement of the Employee under any applicable statute and any rights which the Employee may have at common law, and the Employee thereby waives any claim to any other payment or benefits from the Employer. **Benefits shall cease 4 weeks from the written notice.**
      * The first bolded part is a saving provision essentially saying if for some reason the termination clause provides you with less than what the *ESA* requires you to receive you will receive your *ESA* requirements. This would cover the employer’s butt if the termination clause is found to fall below the *ESA* minimum.

**Reasons:** Court had something to say about “saving provisions”

* “Employees need to know the conditions, including entitlements, of their employment with certainty. This is especially so with respect to an employee’s termination – a fragile moment of stress and uncertainty”
* “In this context, saving provisions in termination clauses cannot save employers who attempt to contract out of the *ESA*’s minimum standards. Holding otherwise creates the risk employers will slip sentences, like the 4 weeks benefits clause, into employment contracts in the hope that employees will accept the terms. This outcome exploits the vulnerable employees who hold unequal bargaining power in contract negotiations. Moreover, it flouts the purpose of the *ESA* – to protect employees and to ensure that employers treat them fairly upon termination: *Machtinger*…”
* “While employers are entitled to contractually amend the ESA’s notice requirements, as long as they respect the minimum standards, they are not entitled to offend them. Employer must have an incentive to comply with the ESA’s minimum notice requirements. They cannot be permitted to draft provisions that capitalize on the fact that many employees are unaware of their legal rights and will often refrain from challenging notice provisions in court: *Machtinger* … Attempting to reconcile the provisions of the Termination Clause with the benefit of hindsight runs counter to the remedial purpose of the *ESA*.

**Held:** CA found that the benefit provision had the potential to violate the *ESA* and that was enough to render it void. The potential is relevant to the analysis.

**Ratio:** A potential violation of the Act can undermine the enforceability of a termination provisions.

**Further Reasons Regarding Benefits Provision:** Terminating the benefits after 4 weeks would violate the Act for any employee with 5 or more years of service because they would be entitled for 5 weeks’ notice and to have their benefits entitled for 5 weeks. A termination clause might not be void at it’s inception but if it has the potential to violate the Act, either with the passage of time or if the employer adopted a particular interpretation, that is enough to render the clause void for violating the Act.

* The court also denounced the use of “saving provisions”. Courts will not use a saving provision to save a non-compliant clause. If it violated the Act, an employer cannot rely on a saving clause or a severability provision to rewrite or strike out the offending portions of the clause or contract. This is how it must be to protect employees and incentivize employers to comply with the Act from the start.

### Waksdale v Swegon North America (2020, ONCA)

**Facts:** An offending just cause provision caused an otherwise valid without-cause provision to be found to be unenforceable. Waksdale was terminated after just 8 months of employment. The written contract he signed contained two discrete provisions dealing with notice of termination. Apply the with notice clause (see below), the employer provided the employee with 2 weeks pay (only 1 week would have been 1 week). There was no issue with this part. However, the contract also included a termination provision that dealt with termination where the employer asserted there was just cause. While it was not relied upon, it was in the same contract of employment. The termination for cause clause included a long list of grounds that would constitute grounds for termination for cause without notice and indicated that wages and benefits would cease as of the date of termination.

**Issues:** (1) How can a provision dealing with dismissal for just cause can run afoul of the *ESA*, be caught by the *Machtinger* problem and therefore be unenforceable? (2) If part of a provision violates the Act, not only can it not be struck or severed from the contract it can affect the enforceability of other provisions.

**Relevant Provision of Contract:** Termination of Employment with Notice

* “You agree that in the event that your employment is terminated without cause, you shall receive one week notice or pay in lieu of such notice in addition to the minimum notice or pay in lieu of such notice and statutory severance pay as may be required under the *ESA*. All reimbursement for business expenses shall cease as of the date of termination of your employment, however, you shall be reimbursed for legitimate business expenses that have been incurred and submitted to the Company but not yet paid you to that date. The terms of this section shall continue to apply notwithstanding any changes hereafter to the terms of your employment, including, but not limited to, your job title, duties and responsibilities, reporting structure, responsibilities, compensation or benefits.

**Prior Proceedings:** At trial the employer conceded that the for cause termination provision violated the *ESA* and was unenforceable but they argued that it did not matter because the employee in this case was terminated with notice and there was no allegation of cause. The clause was therefore not relevant. The lower court agreed with the employer that the severability clause meant that even though the for cause provision violated the Act, that did not mean that the notice provision was also invalid.

**For Cause Termination Provision:** Included a long list of grounds on which the employer would terminate and some of these would likely not meet the threshold of willful misconduct or neglect of duty under the *ESA.* The contractual clause mentioned things such as unsatisfactory job performance, breaches of duties etc. Employer conceded this provision would violate the Act because it would set a much lower standard for establishing just cause by removing the intentional element required by the employee. However, in referencing their severability clause, the employer stated that the fact that this for provision violated the Act did not make the termination by notice provision of the contact invalid.

**Held:** Disagreed with lower court regarding unenforceability of the notice provision as a result of the for cause provision being unenforceable.

**Reasons:** Because for-cause provision was in violation of the Act, it was unenforceable and so was termination with notice provision as a result.

* “An employment agreement must be interpreted as whole and not on a piecemeal basis. The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the ESA. Recognizing the power imbalance between employees and employers, as well as the remedial protections offered by the ESA, court should focus on whether the employer has, in restricting an employee’s common law rights on termination, violated the employee’s ESA rights. While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal. In conducting this analysis, it is irrelevant whether the termination provisions are found in one place in the agreement or separated, or whether the provisions are by their terms otherwise linked. Here the motion judge erred because he failed to read the termination provisions as a whole and instead applied a piecemeal approach without regard to their combined effect”
  + The *ESA* is remedial legislation that is to be interpreted broadly to protect as many employees as possible
  + The law should encourage employers to draft termination clauses that will always comply with *ESA* termination requirements
  + The test is whether contract termination provisions COULD conceivably permit termination that violates the *ESA*
    - Therefore, the test is not whether the specific provision did violate the Act but rather whether it could have
* “The Court notes that employers may benefit from illegal clauses even if they never directly rely upon them because employees may believe that the terms are enforceable and adjust their behaviour accordingly. Nor does the severability clause help the employer here, because ‘a severability clause cannot have any effect on clauses of a contract that have been made void by statute.”

**Demeyere’s Opinion:** Did this case go too far? The employer was not relying on the for-cause provisions and it is not clear how in agreeing to those terms the employee was actually any worse off. Not sure that even if he thought he just cause provisions were binding such that he would not get any notice if he engaged in any of those conducts how that was a burden on the employee or how he would have changed his behaviour in order to comply with this provision.

## Fixed Term Contracts

* Common law presumption of reasonable notice is an implied term in contracts of employment of indefinite duration (where no end date is specified so something is needed to bring the relationship to an end)
* A contract for a fixed term or a fixed task ends when the term or the task is done so nothing more is needed to bring about the termination. The contract simply ends by virtue of the agreement of the parties to end it at that moment and no notice of termination is required
  + In effect, notice of termination is given upon contract formation because the term (length of the contract) is settled upon at the outset
* Therefore, the common law presumption of reasonable notice DOES NOT APPLY to fixed term contracts

### Ceccol v Ontario Gymnastics Federation (2001)

**Facts:** Ceccol worked for the Ontario Gymnastics Federation for 16 years pursuant to 15 1-year fixed term contracts. Each contract was identical and stated that it was for 1 year and subject to renewal or termination if the employee engaged in improper behaviour of any kind. After the last renewal, the Federation told Ceccol that the contract would not be renewed and that her employment would end when that 1-year contract expired. Ceccol brought an action for wrongful dismissal seeking reasonable notice of termination. Ceccol argued that she was an indefinite term employee and as such, the employer was obligated to provide her with common law damages for the failure to provide reasonable notice.

**Issue:** Was the contact for indefinite term meaning that common law damages for reasonable notice were required?

**Reasons:** CA held that the terms were ambiguous because while one clause of the contract stated that it was for 1 year, other clauses of the contract seemed to suggest that it could last for longer than that. At the time of hiring, it was presented as a full-time position (for an indefinite term) and that is how the parties behaved.

* “Fixed term contracts are …legal. If their terms are clear, they will be enforced…. However, the consequences for an employee of finding that an employment contract is for a fixed term are serious: the protections… of the common law principle of reasonable notice do not apply when the fixed term expires…”
* “It seems to me that a court should be particularly vigilant when an employee works for several years under a series of allegedly fixed-term contracts. Employers should not be able to evade the traditional productions of… the common law by resorting to the level of “fixed term contract” when the underlying reality of the employment relationship is something quite different, namely, continuous service by the employee for many years coupled with verbal representations and conduct on the part of the employer that clearly signal an indefinite-term relationship…”
* “I conclude that the employment contract was for an indefinite term, subject to renewal and termination in accordance with the other provisions in the contract.”
* It was the employer’s ambiguity that was their downfall. If the employer had taken steps to make it clear that the fixed term was to be a fixed term contract, the court may not have found Ceccol’s state to be ambiguous. But it was the same contract renewed year after year, everyone expected it to be renewed and the expectation from the outset was that Ceccol was a full time, permanent employee.

**Held:** Court awarded Ceccol damages for 16 months reasonable notice, but it deducted 4 months because she failed to take reasonable steps to mitigate her losses.

**Note:** Employer pointed to a provision in the contract which stated that the parties “agree to abide by *ESA* concerning notice of termination of employment”. Court rejected employer’s argument stating that this provision was not sufficiently clear to rebut the presumption that Ceccol was entitled to reasonable notice under common law. The court suggested that explicit language rebutting the common law was required.

**Note:** A string of fixed term contracts will not always result in an indefinite term contract. The court will insist on clear evidence from the employer that the contract under which the employee was most recently hired was indeed a fixed term contract. The employer could take steps to try to ensure that the fixed term contract is respect as such. They could ensure that it does not expressly or implicitly convey that the employee is a permanent of indefinite term employee. The employer should also not do anything to suggest that the renewal of the fixed term contract is a sure thing. IF instead the employer had held a performance evaluation or a meeting with the employee to discuss renewal this would bolster the idea that it was a fixed term contract because renewal was not certain.

**Ratio:** A series of fixed term contracts may be found to be an indefinite term employment relationship which raises the presumption of common law notices.

### Howard v Benson Group (2016)

**General Principle:** If one party tries to terminate a fixed term contract before the agreed upon end date, that party will be found to be in breach of contract unless the contract expressly permits early termination and the terms regarding termination have been complied with. The damages here are regular contract damages such as reasonable expectation damages (what is required to put the non-breaching party in the position as it the contract had been performed).

**Facts:** Parties entered a fixed term contract for 5 years commencing September 2012. Howard was terminated, without cause, after just 23 months. There was a clause in the contract (below) which stated that the employer could terminate the contract early and in which case any amounts paid to the employee shall be in accordance with the *ESA*. The employer gave Howard 2 weeks’ notice which was the minimum under the *ESA* given his length of service. Howard sued for damages, claiming that he was entitled to compensation for the balance of the contract.

**Issue:** Whether the employer was required to pay damages for the loss wages for the remainder of the fixed term contract.

**Relevant Contractual Provision:** 8.1 – Employment may be terminated at any time by the Employer and any amounts paid to the Employee shall be paid in accordance with the *ESA*.

**Held:** Yes, it is a well settled principle that early termination of a fixed term contract, the employer is liable for damages for the reaming period of the contract unless the contract allowed for such termination. Employer was liable for damages based on loss wages and benefits for a period of 36 months (remainder of the 5 year contract).

**Reasons:** the court found clause 8.1 to be ambiguous and applying *contra proferentem* adopted an interpretation most favorable to Howard. Court said that the clause was not clear because it was not clear whether the notice was limited to the *ESA* or whether it simply stated that whatever notice is given is going to be at least equal to the *ESA*. Clause was also not clear whether benefits would be paid during the notice period since it only referred to “amounts paid”. Court said that this is consistent with the employer not continuing benefits as it is required to do under the Act. As such, the clause was void for violating the Act.

**Note:** This case is also significant for what it says about mitigation with respect to termination of fixed term contracts. Normally, a wrongfully dismissed employee is subject to a duty to mitigate which means they must take reasonable steps to mitigate their losses. In the context of employment, this means an employee who was wrongfully dismissed must take reasonable steps to find alternative employment and if they are successful in finding alternative employment, whatever they earn during the notice period in that alternative position will be deducted from any liable from the previous employer. However, a failure to take any reasonable steps to mitigate may also result in a deduction of the notice period. However, when it comes to fixed term contracts, CA said that an employee who has had their employment terminated prior to the end of the fixed term is not presumed to be under a duty to mitigate at all. They are only under a duty to mitigate if the contract expressly imposes such a duty and this contract did not.

**Ratio:** In the case of a true fixed contract, there is no presumption of common law notice. Instead, an employee who is dismissed before the end of the term is presumed to be entitled what they would have earned in the balance of the fixed term period. Also, this employee under the fixed term contract is presumed not to be under a duty to mitigate.

* The word “presumed” is important because the parties remain free to agree to their own terms as long as what they agree to does not create a potential for a violation of the *ESA*.

## Restrictive Covenants

* These are terms that seek to restrict the employee’s activities after the contract is terminated
* Issue here is whether the restrictive covenant, the activity it seeks to restrict, the length of time it seeks to restrict it and the geographic scope in which it seems to restrict the activity meet the common law requirements of reasonableness
* A restrictive covenant is essentially an attempt to limit or control the employee’s ability to compete with their employer after their employment has come to an end

#### Three Main Types of Restrictive Covenants

1. Non-disclosure
   1. Prohibits a former employee from disclosing information that the employer has a proprietary interest
   2. “Upon termination of this contract, the employee shall not retain, remove from the employer’s property, or destroy any document or computer file containing confidential information, and shall not at any time disclosure to any person any confidential information relating to the employer”
2. Non-solicitation
   1. Prohibits an employee from attempting to persuade the employer’s customers or clients to stop doing business with the employer and instead do business with the departing employee
   2. “The employee agrees not to solicit business by any means from any existing or former client of the employer for a period of one year after the termination of this contract.”
3. Non-competition
   1. This is the broadest clause
   2. This clause seeks to prohibit the former employee from entering into competing business with the employer
   3. “Upon termination of this contract, the employee shall not retain, remove from the employer’s property, or destroy any document or computer file containing confidential information, and shall not at any time disclose to any person any confidential information relating to the employer.”

#### Restrictive Covenants

* Restrictive covenants “give rise to tension in the common law between the concept of freedom of contract and public policy considerations against restraint of trade.” (*Shafron)*
* “The public have an interest in every person’s carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and al restraints of trade themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions… it is sufficient justification … if the restriction is reasonable.” (*Nordenfelt)*
* The common law has developed a test to assist with determining whether the restriction is reasonable – *Elsey v JG Colllins Insurance* (SCC, 1978)
  1. The covenant protects a real “proprietary interest” worthy of protection, such as trade secrets, confidential business information, or key business connections and customer lists and is not simply an attempt to retract healthy competition;
     + It cannot be just a preference by the employer that there is no extra competition in the marketplace
  2. The covenant is reasonable as to geographical and temporal (time) scope, considering the specific type of work and the interests involved;
     + Covenant will set a geographic set in which the activity is prohibited and a length of time following termination of employment that the activity is prohibited
     + In determining whether the geographic scope is reasonable, the courts will look at the particular type of work and what is reasonable to protect the employer’s legitimate business interests in each case (case specific)
  3. The covenant is reasonably necessary to protect the legitimate interests of the former employer, and no alternative measure that is less restrictive on the former employee could protect the employer’s interests; and
     + Courts have been more accepting of non-disclosure and non-solicitation clauses than they have been of non-competition clauses.
     + If the employer’s business interest could have been protected by a non-solicitation or a non-disclosure clause, then the court is more likely to strike down a non-competition clause as being excessive or unreasonable in the circumstances
     + However, if a non-solicitation clause would not adequately protect the employer’s legitimate interests, then courts may be more likely to enforce a non-competition clause assuming that it is clearly expressed and the restrictions are reasonably in terms of geographic scope and time limits
  4. The covenant is unambiguous such that its scope is clear and understandable.

### Shafron v KRG Insurance Brokers (2009)

**Facts:** Plaintiff sold his shares in his insurance company to KRG and then KRG renamed the business KRG Insurance Brokers. The plaintiff worked for the defendant following the sale of the shares and over the next 12 years the plaintiff entered into several employment contracts with the company. Those agreements always included a non-competition clause (outlined below). While the non-competition clause referenced the geographical scope of the “Metropolitan City of Vancouver” there is actually no area known as the Metropolitan City of Vancouver. This was the problematic aspect of this clause. Shafron left KRG in 2001 to work for a competitor in Richmond, a neighboring city. KRG then commenced an action to enforce the restrictive covenant against Shafron.

**Relevant Contract Provision:** 12 – Shafron agrees that, upon leaving the employment of MSA or KRG Insurance for any reason save and except for termination by KRG Insurance without cause, he shall not for a period of three (3) years thereafter, directly or indirectly, carry on, be employed in, or be interested in or permit his name to be used in connection with the business of insurance brokerage which is carried on within the Metropolitan City of Vancouver.

**Prior Proceedings:** TJ dismissed the employers action against Shafron and said that because of those last few words, the Metropolitan City of Vancouver, was not clear because there was no such thing and therefore it was unreasonable and unenforceable. CA agreed with the TJ but they substituted for Metropolitan City of Vancouver what it took to be a reasonable interpretation of that choice of language. They settled on the language of “the City of Vancouver, the University of British Columbia downlands Richmond and Burnaby”. The CA effectively rewrote the clause for the parties so as to remove the ambiguity.

**Issue:** Was the CA correct in rewriting the clause in order to remove the ambiguity.

**Held:** SCC overturned the CA’s decision. SCC refused to invoke rectification to uphold the provision. It restored the judgement of the trial court which held that the restrictive covenant was unreasonable due to the ambiguity and was therefore unenforceable.

**Reasons:** Said that the reference to “Metropolitan City of Vancouver” was ambiguous and that any ambiguity renders the restrictive covenant unenforceable. There was no evidence available to assist in resolving this ambiguity. There was no evidence that the parties would have agreed to remove the language of “Metropolitan” and there was no evidence they agreed on something but then they mistakenly put something else in the contract.

* SCC held that the CA had erred when it rewrote the restrictive covenant in this way. SCC said it was inappropriate for the CA to rewrite the geographic scope in the restrictive convent to what the CA thought was reasonable.
* SCC also spoke about the doctrine of “severance” in the context of restrictive covenants in employment contract. There are 2 kinds of severance and the SCC said that both of these need to be cautiously applied to restrictive covenants to render one that is otherwise illegal to be legal. These two types of severance are:
  + Blue pencil severance: refers to striking out an offending provision of a contract which leaves the rest of the agreement intact and does not affect the meaning of the rest of the agreement.
    - SCC said that this form of severance should be resorted to sparingly and only in the cases where the part being removed “is clearly severable, trivial and not part of the main purport of the restrictive covenant”
    - Court emphasized that the general rule must be that a restrictive covenant in an employment contract that is ambiguous or unreasonable will be void and unenforceable
    - SCC said this was not a good case for blue pencil severance because it was not clear that simply striking the word “Metropolitan” would have reasonably represented what the parties would have unquestionably agreed to as it appears that they intended to include more than just Vancouver by including that language. Court said it was too invasive on the part of the Court to restrict this because you cannot be clear that that that would be an amendment to the contract that truly respects what the parties intended
  + Notional severance: involves reading down a contract’s illegal provision to make it legal. Can amount to re-writing
    - Notional severance is what the SCC did in this case
    - SCC said that notional severance “has no place in the construction of restrictive covenants in employment contracts because there is no objective bright line rule that can be applied in all cases tor ender the covenant reasonable. Applying notational severance in these situations simply amounts to the court rewriting the covenant in a manner that it (the court) subjectively considers reasonable in each individual case.”
    - SCC also said, “Further, allowing the use of the doctrine of notional severance really just invites the employer to impose an unreasonable restrictive covenant on the employee with the only sanction being if the convent is found to be unreasonably, the court will still enforce it to the extent of what might validly have been agreed to”
    - SCC said that notional severance should not be applied to restrictive covenants in employment contracts
* In the context of unreasonably wide restrictive covenants, the SCC cautions the possibility of any kind of severance invites employers to draft overly broad covenants because if it came to it, the court could sever or read down any unreasonably portions.

**Ratio:** Employers will not be able to rely on courts for assistance to save their restrictive covenants. Employers need to get it right the first time to ensure that the language and content of the restive covenants is sufficiently clear and reasonable in order to be enforceable.

### Martin v Concreate USL (2013)

**Facts:** Martin worked for Concreate and he had a minority shareholder interest in the company as well as an interest in a related business, Steel Design Fabricators. Concreate and Steel Design were purchased by TriWest Construction. Martin retained his minority interest in Concreate and Steel Design. When Concreate sold it’s assets to the entity controlled by TriWest, he maintained 25% of the outstanding limited partnership units of TriWest. As part of the sale and his continued employment, Martin entered into agreements containing restrictive covenants relating to non-competition and non-solicitation and relating to the use of confidential information. The non-competition and non-solicitation covenants stipulated that they would end 24 months after Martin sold his shares. However, it also stated that he couldn’t sell those shares without first gaining approval from the company and their lenders. His employment was terminated 6 months after the sale and he began a competing company 8 days after. Concreate sued Martin claiming that he breached the restrictive covenants and his fiduciary duties. They sought damages and an injunction against him. Martin, in reply, took the position that the restrictive covenants were not enforceable.

**Issue:** Were the non-competition and non-solicitation clauses in the agreements ambiguous or unreasonable and therefore, unenforceable?

**Held:** CA held that the restrictive covenants included in sale of a business agreements were unenforceable.

**Reasons:** CA noted that this was a restrictive covenant entered into in the context of a sale of a business not as purely part of an employment contract which meant that the standard here was not as high as it would be in a pure employment case. But, even in this context the covenant had to be reasonable to be enforceable and that was not the case. CA said the restrictive covenant failed to meet the standard of reasonableness because of temporal element, the time limit. The duration of the restriction was unreasonable because it was for an indeterminate period of time as there was no fixed, well-defined time period. The duration was not calculated from the time of the sale or the time of his employment coming to and end but it dependent on when Martin sold his shares which was dependent on acquiring the consent of third parties. It was not clearly defined and for that reason the Court declared the restrictive covenant to be unreasonable and therefore unenforceable.

### Rhebergen v Creston Vetrinary Clinic (2014)

**Facts:**  Dr. R was a newly qualified vet who entered into an agreement with the vet clinic located in Creston, BC as an associate at the clinic. The agreement contained a clause that looked like a restrictive covenant. However, rather than prohibiting competition it stated, “if she set up a veterinary practice in Creston, BC or within a 25 mile radius of clinic, she would owe certain levels of compensation to the clinic.” In particular, if she set up a practice within 1 year of the termination of her contract, she would be required to pay $150, 000 to the clinic. Within 2 years it would be $120.000 to the clinic. Within 3 years it was $90, 000 to the clinic. After 14 months she resigned from the clinic and there was some dispute about whether the contract allowed her to terminate the contract and what was required to terminate it but the parties went their separate ways. 5 months later, Dr. R brought an action seeking an order declaring this clause unenforceable because she wanted to set up a mobile vet practice in the area.

**Relevant Provision:** Relevant non-competition provision was unique in that it did not expressly prohibit non-competition but discouraged it.

**Held:** The clause was upheld. The CA found no ambiguity, even though there were several arguments made about the language and the reference to what it would mean to “set up” a clinic.

**Reasons:** Court said language was not ambiguous just because it failed to imagine every possible scenario such as a mobile vet clinic. Court also noted that there was no evidence Dr. R did not understand the significance at the time that she agreed to me bound by it. As such, the court was not worried about any undue pressure or inequality of bargaining power between the parties. The court was not persuaded that it should refuse to hold the parties accountable to the terms of their bargain and so the clause was found to be reasonable and therefore, enforceable.

* Court found the element of the clause which required Dr. R to compensate the clinic based on how long after she set up a practice not to be liquidated damages but rather, compensation for the expense the company would have put into Dr. R’s training as her period as an associate at the clinic. These were orders to compensate the clinic for these expenses.

**Ratio:** Courts might be more willing to enforce clauses that put a price on competition rather than barring it completely. Employers that want to use these kinds of clauses should be careful to have a clear basis for the amounts of compensation it includes in the clauses.

## Incorporation of Ancillary Terms

* Ancillary terms captures terms that do not appear in what the parties’ themselves might have regarded as the written contract of employment but nonetheless are part of the contract perhaps because the parties explicitly agreed to incorporate them or because they have implicitly agreed to have them included by their conduct
* Ancillary contractual terms are found in secondary contractual documents such as human resource policy manuals, employee handbooks, Benefits policies, retirement plants, company rules etc.
  + These are documents that are often physically separate from the contract, but the rules and terms found in them can sometimes form part of the employment contract
  + They often contain rules regarding employment, discipline plan, benefit entitlements
* Asks the same questions as regular contracts – has there been offer, acceptance, consideration and intention to create legal relations?
* At a minimum, both parties must be aware of the document and there must be evidence that the parties agreed to the terms and understood and intended the document to be legally binding
* If the document exists at the time the employment relationship begins it can be expressly incorporated into the contract with clear language
* If a document is introduced after contract formation, it will represent a modification of terms and require fresh consideration
* Two main reasons ancillary documents are found not to be incorporated:
  + There is no evidence that the parties intended it to be legally binding OR
  + It amounted to a unilateral alteration in the terms and was unsupported by fresh consideration

### Dawson v FAG Bearings LTD (2008)

**Facts:** Sometime after commencing her employment with FAG Bearings, Dawson was given a copy of an Employee Handbook and was told to review it. There was no written contract in place. She was hired pursuant to a verbal conversation and then she commenced work and later she was given this Handbook. Contained in the Handbook was an explanation of the company’s progressive discipline policy. Some years later, Dawson was terminated for cause. She sued for wrongful dismissal.

**Employer’s Argument:** The employer wanted to rely on the Handbook in order to make out it’s defence of just cause.

**Held:** Progressive discipline policy was found not to be a part of her contract. Handbook failed to be a part of the contract for 2 reasons: (1) the parties did not have evidence of intention to create legal relations and (2) even if they did regard it as terms, it had failed to be incorporated into their unwritten employment contract because it would have represented a unilateral introduction of new terms and it was not supported by fresh consideration.

**Reasons:** In determining whether there was cause for the dismissal, the court found it relevant to ask whether the progressive discipline policy was part of Dawson’s employment contract.

* “It would have been possible for FAG to incorporate the terms of the Employee Handbook into the employment contract if it had been made clear in the offer of employment that the offer was conditional upon Dawson agreeing to accept some or all of the terms as contained in the Employee Handbook. Furthermore, the introduction of the Handbook, in my view, makes it clear that it is not intended to form part of the employment contract. The final paragraph in the introduction states:
  + *The handbook contains the general rules and guidelines for employees to understand and follow. Developed over the year in cooperation with our Employees Committee, the handbook will serve to guide us in our daily activities and will, as time and needs warrant, be reviewed and updated to ensure they remain current.”*
* “The reference to the Handbook containing general rules and guidelines is inconsistent with it being a contractual document. In addition, the indication that it will be revised from time to time means that there would be many different employment contracts applicable to different employees depending on the version of the handbook which existed at the time of the commencement of employment”.
* For two reasons the progressive discipline policy was found not to be a part of Dawson’s contract:
  + (1) Consideration problem – if they were terms, they were introduced after the formation of the contract of employment so they would have to be supported by fresh consideration and there was no fresh consideration here
  + (2) The parties themselves did not regard them as contractual terms. They did not think of the Handbook as a part of their legal relationship.
    - Court pointed the language of the Handbook which reference “general rules and guidelines” and held that wasn’t up to the level of contractual terms
    - Court also mentions the fact that the clause stated that there would be revisions from time to time. Dawson have never received a new one and so the rules and guidelines in her Handbook might have been different than someone else which led then made it seem like the employer was not regarding these as contractual terms

## The Duty of Good Faith and Other Implied Terms

* Implied terms are those that are agreed to only either implicitly (based on the parties’ conduct) or are implied by operation of law into the contract
* Implied terms can be divided into two categories:
  + (1) Terms Implied in Fact: terms based on the presumed intentions of the parties
    - Business efficacy test
    - Officious by-stander test
  + (2) Terms Implied by Law: terms that are read into the contract. They are not based on the presumed intentions of the parties but instead by operation of law
    - Reasonable notice
    - Managerial prerogative
    - Duty to serve
    - Good faith and fair dealing

#### Terms Implied in Fact

* By implying the term, what the court is doing is giving expression to the agreement the parties intended to make.
* Business Efficacy Test:
  + A term can be read into the contract IF it is necessary to make the contract work (as if the parties would have agreed to it because the presumption that they wanted their contract to work)
* Officious By-Stander Test:
  + That which in any contract is left to be implied and needn’t be expressed is something so obvious that it goes without saying so that if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a comment “oh of course”
  + This is the court flushing out what the parties would have agreed to if their attention had been drawn to the matter
* There are other basis for which terms can be implied in fact (i.e. if there is a customary norm that implies to a workplace that could be read into a contract, past practices in the workplace – if the parties engage in a particular behaviour at the workplace at some point, that conduct can give rise to implied terms)
* A workplace norm or pattern of behaviour can give rise to an implied term

#### Terms Implied by Law

* There is sometimes difference in terminology
  + Duty to serve is sometimes called duty to obey or a duty of fidelity (sometimes include duty to advance employer’s interest instead of their own)
  + However, this is on a sliding scale – the more senior the employee, the more duty they will have
* There has been development in the common law over the years with respect to an employer’s implied duties

### Lloyd v Imperial Parking (1996)

**Facts:** Lloyd had resigned from his employment after being subject to months of verbal abuse and constant threats from his supervisor. Lloyd claimed that he had been constructively dismissed. His argument was that the bullying and harassment left him with no choice but to resign.

* One way to think about constrictive dismissal is a fundament breach by the employer that amounts to a repudiation of the contract by the employer entitling the employee to treat the contract as at an end.

**Reasons:**

* “It is well recognized that in the absence of cause, any fundamental breach by the employer of a major term of the employment relationship allows the employee to take the position that a constructive dismissal to exist, the breach must be in relation to a fundamental term of the employment relationship, rather than just a minor or incidental term. There must be a fundamental breach of a fundamental term of employer before one can claim to be constructively dismissed.
* A fundamental implied term of any employment relationship is that the employer will treat the employee with civility, decency, respect, and dignity. The standard that has to be adhered to by the employer is dependent upon the particular work environment. This appears to be part of the trend to establish a duty upon an employer to treat employees “reasonably” in all aspect of the labour process.
* In this case, a fundamental implied term of the employer/employee relationship has been breached. [The supervisor] did not treat Lloyd with the civility, decency, respect and dignity to which he was entitled.”

**Ratio:** An implied duty of decency on the part of the employer is recognized.

### Antunes v Limen Structures (2016)

**Facts:** When hiring Antunes, a Mr. Lima, employer representative and a friend of Antunes, represented to him that the company, Limen Structures, was worth $10 million. As part of his compensation, he offered Antunes shares representing 5% of Limen’s worth which would have equated to $500, 000. Antunes said that he believes, given his familial relationship with Lima, that Lima was a successful businessman with a successful company and trusted Lima. Antunes began work as a Senior Vice President with the company and believing that he would be entitled to that interest in the company. Not only did the shares never materialized but Antunes was fired 5 months after he commenced employment.

**Held:** Court awarded him $500, 000 for the value of the proposed terms. They also ordered damages for pay in lieu of notice of dismissal.

**Reasons:** The court did not award him this because there had been a misrepresentation (it was just an expression of opinion) but the court invoked the general duty of good faith and honesty performance in contracting to support the damages award.

* “A party to a contract must be able to rely on a minimum standard of honesty from the contracting partner in relation to performing the contract with the reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests.”
* Court found that Limen had failed to deal with Antunes honestly during negotiations. Antunes relied on the untrue representations made by Lima regarding the financial circumstances before he accepted the offer
* Court found that Antunes was contractually entitled to 5% of Limen shares as this entitlement was clearly set out in his contract. However, the court went further and in valuating the shares, they based that on the representation that Lima made to Antunes during the hiring process. In the court’s view, Antunes was told her would receive shares worth $500,000 in exchange for commencing employment with Limen and even though the contract was silent on the value of the shares, the court pointed to that representation plus the expectation that contractors will deal with each other honestly and decided to put Antunes in a position commensurate with his expectations. He would have to be compensated with Lima’s representations.
* Key to the court’s decision was the invocation of the generalized duty of good faith and honest performance in contracting that originated in *Bazin*

### Bazin (2014)

**Ratio:** SCC declared there to be an “organizing principle in the law of contract based on good faith and fair dealing”. This case introduced a duty of honest contractual performance into all contracts. Good faith imposes just a general duty of honest, contractual performance.

## Termination of Employment: Reasonable Notice

## Overview of the Forms of Termination at Common Law

#### Termination with Notice

* After 3 weeks of employment it is 1 week per year of service
* Employer can opt to give the employee pay in lieu of notice
* They might meet the minimums by providing a combination of working notice and pay in lieu of notice
* One option for an employer who wishes to terminate the contract with notice is to offer a lump sum that reflects the employment standards minimum and the common law requirements
  + The problem with this option is that this is a large sum of money at once and if the employees goes and finds another job, the employer does not get to benefit from the employee’s mitigation
* The other option is if the employer continues the employee’s salary and benefits as a salary continuance and the employee finds a new job before the notice period ends, the employer can effectively remove the duty to mitigate.
* Employer may also continue the employee’s salary and benefits during the notice period. If they do this, the parties should agree in writing that these payments include any statutory entitlements under the *ESA* and the parties can also agree that if the employee finds new employment during the notice period that the salary continuation would come to an end. This arrangement could provide for example, that the employee would still receive a final lump sum payment equal to, for example, 50% of what the employee would have received in the remainder of the notice period if they found a job earlier.
  + Salary continuation also includes benefits (employers are obligated to continue benefits during the notice period). Employees are also entitled to other things they would have earned during the notice period such as commissions, gym memberships, employee discounts, bonuses, and stock options.
* An employer cannot ask for a release regarding *ES* termination and severance for human rights, but the parties can agree to a release with respect to common law entitlements
* *ESA* awards are not subject to mitigation, but common law awards are
* If the parties do not say anything about termination in the contract then it is generally governed by the common law. But, an employee can also file an *ESA* complaint rather than going through the courts if they want. The common law entitlement stands to be much more than the statutory however, as the common law is typically 1 month per year of service with no upper cap.

#### Termination for Just Cause

* This is where the employer is not obligated to provide notice of termination which is when the employer has just cause to terminate the contract
* *ESA* also creates an exemption for just cause. The employee will lose their entitlement to termination and severance pay under the *Act* where they are caught by this exemption. The *ESA* exemption is more employee favoring than the common law standard. The *ESA* provision required an element of willfulness, or intentional wrongdoing on the employees’ part. But, at common law the standard is not quite as high.

#### Frustration of Contract

* Contract that is frustrated comes to end because something unexpected or unforeseeable has happened which prevents one or both of the parties from performing
* In this case, there is no obligation on the part of the employer or employee to provide notice or pay damages

#### Constructive Dismissal

* This is where the employee is not dismissed outright. The employer never fires them but through it’s conduct, the employer evinces an intention to no longer be bound to the contract
* The employer is taken to have repudiated the contract and the employee in turn is entitled to treat the contract as at an end and sue for damages owing to the failure of the employer to provide damages
* A constructive dismissal without notice is a wrongful dismissal.

#### Resignation

* Where the employee quits. The employee terminates the contract
* There is also wrongful resignation – a resignation that is given without sufficient notice

## Wrongful Dismissal & Reasonable Notice

#### Common Law Implied Term of Reasonable Notice

* At common law, a contract of employment of indefinite duration is presumed to be terminable by either party, in the absence of just cause, only upon reasonable notice
  + At common law- the contractual entitlements as opposed to the minimums under the *ESA*
  + We are not talking about an independent contractor relationship because this is only for the contract of employment (always will need to first determine if it is an employee or dependent contractor relationship rather than an independent contractor relationship)
  + Contract must also be of indefinite duration – there is no implied term of reasonable or any notice for a fixed term contract because the parties already know when the contract will end
  + Presumed – it is a rebuttable presumption. If the parties have not agreed to the terms with respect to termination, or do not have a written contract at all, they will be presumed to have agreed to reasonable notice but they can rebut this presumption with a term of their own creation
  + Either party can terminate the relationship through either dismissal by the employer or resignation by the employee
  + Where the employer can establish just cause, some kind of misconduct or wrongful behaviour that amounts to just cause on the common law standard, the employer has no obligation to provide notice of termination. In this case, the employees conduct repudiates the contract and brings it to an end
* The obligation to provide reasonable notice comes from a common law implied term as outlined above

#### History of Reasonable Notice

* Prior to the late 19th century, employment contracts were presumed to be for a 1 year fixed term unless otherwise stated. It was shortly after this that courts started to adopt a presumption of an indefinite term and a requirement of reasonable notice.
  + “If no custom nor stipulation as to notice exists, and if the contract of service is not one which can be regarded as a yearly hiring the service is terminable by reasonable notice”
    - *Halsbury* (1911)
  + 1981 Alberta case – “An employee is entitled to reasonable notice of termination. The amount of notice depended on a number of factors including the employee’s class and their general standing and the probably facility or difficulty the employee would have in procuring other employment”
* By the 1920’s, the presumption that a contract was of indefinite duration and could be terminated by reasonable notice had taken over in Canada.
  + *Carter v Bell Son’s,* 1936 (ONCA)
    - Court stated the rule that “there is implied in the contract of hiring an obligation to give reasonable notice of an intention to terminate the arrangement”

#### The *Bardal* Factors

* “There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualification of the servant”
  + The focus here was on the time of termiantion
* *Bardal v Globe and Mail* (1960, ONSC)
  + This is the decision we turn to in deciding what is reasonable
  + **Facts:** Bardal was an advertising manager with 16.5 years of service when his contract was terminated. His employment contract was silent on the issue of how much notice was required to terminate the contract.
  + **Issue:** How much notice was required for the employer to lawfully terminate Bardal’s employment contract?
  + **Held:** 1 year was reasonable notice.

#### Character of Employment

* Traditionally, the idea was that more senior, managerial, highly skilled high-level executive employees are entitled to more notice than junior, less skills or clerical employees. The assumption was that these higher-class employees deserved greater protection presumably because their work was of superior importance.
* At common law, this is justified because managerial and higher-level employees will have a harder time finding alternative employment than will lower level employees
* Until recently, the presumption created an unwritten rule that managerial employees were entitled to upwards of 24 months’ notice whereas nonmanagerial employees were capped at 12 months’ notice. There are now several departures from this rule, however.
  + *Cronk v Canadian General Insurance*
  + *Minott v O’Shanter Development*
  + *DiTomaso v Crown Metal Packaging*
  + *Love v Acuity Investment Management*

### Cronk v Canadian General Insurance (1995, ONCA)

**Facts:** Cronk was a 55-year-old insurance clerk who was dismissed after 30 years of service. She sued for wrongful dismissal and she sought reasonable notice in the amount of 20 months, well above the unwritten standard of 12 months for a non-managerial employee. The lower court challenged the assumption and said that it could not be assumed that non-managerial employees would have an easier time finding a job. Instead, they said that Cronk, given her age and skill set, might have a harder time finding another job. He awarded her the 20 months

**Held:** ONCA overruled the trial court’s decision and reaffirmed the “established principle that clerical employees are generally entitled to a shorter notice period than senior management or specialized employees who occupy a high rank in the organization. They reduced the award to 12 months’ notice.

**Reasons:** ONCA refused to challenge the assumption that these high-level employees would have a harder time finding alternative work because it would be too disruptive for employers and their lawyers.

* “The lower court decision has the potential of disrupting the practices of the commercial and industrial world wherein employers have to predict, with reasonable certainty, the cost of downsizing or increasing their operations particularly in difficult times. As well, legal practitioners specializing in employment law and the legal professional generally have to give advice to employers and employees in respect of termination of employment with reasonable notice.”
* Trial judge went off on his own and did his own research with respect to whether clerical employees have an easier time finding jobs. The ONCA found that this was an improper exercise of power.

### Minott v O’Shanter Development

**Held:** ONCA awarded a non-managerial maintenance worker with 11 years’ service at the time of dismissal 13 months reasonable notice.

**Reasons:** The court distinguished the case from *Cronk* on the basis that *Cronk* dealt with clerical workers and not all non-managerial workers. In this case, the employee was a maintenance worker, not a clerical worker.

* The court also questioned whether there should be a cap for non-managerial employees by saying “having a cap might detract from the flexibility of the *Bardal* test and it would restrict the ability of courts to take into account all the factors relevant to each case and of changing social and economic conditions”

### DiTomaso v Crown Metal Packaging (2011, ONCA)

**Facts:** Mr. D worked for over 33 years as a mechanic at Crown Metal Packaging and was a non-managerial employee. In September 2009, the employer told Mr. D his employment would be terminated on November 6th. However, over the next 6 months they kept extending the termination date by written notice. It was not until February 24th 2010 that he was given the final notice of termination and he was told that it would be effective 2 days later. The employer, upon the dismissal, paid Mr. D a total of 26 weeks of statutory severance pay. Mr. D was 62 when he was dismissed. He sued for wrongful dismissal for 24 months. The employer argued that this was too excessive by pointing to Mr. D’s position as a mechanic and claimed he was a low level worker, he was unskilled and that at most common law notice should be 12 months.

**Held:** Agreed with Mr. D that the extensions made the working notice equivocal and that only the final letter actually provided notice of termination. Upheld the award of 22 months notice.

**Reasons:** Said the court needed to apply the *Bardal* factors. CA concluded that there is no automatic cap for reasonable notice damages for non-managerial employees. There is no logical reason why the court should assume that unskilled employees deserve less notice because they will have an easier time finding employment. The empirical volatility of that proposition cannot be taken for granted. It must be assessed on it’s own facts without making assumptions about whether managerial employees would have a hard time finding alternative employment than lower level non-managerial employees.

* The other issue on appeal is that the employer argued that it should get some credit for earlier notice it gave the employee even though there were several extensions. The court held that there was no certainty until the last termination letter. The uncertainty up until then rendered the earlier notices ineffective.

**Ratio:** The character of employment had become a factor of declining relative importance and the position that junior employees have an easier time finding alternative employment is no longer a matter of common knowledge. Where there is any uncertainty or ambiguity as to the date that the termination is to be effective, courts are likely to construe that in the employee’s favour

### Love v Acuity Investment Management (2011, ONCA)

**Facts:** Love had only 2.5 years of service. Love was a Chartered Account and one of 2 senior VP’s and reported directly to the CEO. 2 years into his employment he became a 2% equity owner and one of 9 shareholders. He had sole responsibility for managing investment clients and the business they brought into the company. The value of his total compensation package and the value of his shares was over $600,000 per year.

**Held:** TJ erred in awarding only 5 months’ notice. Instead, the substituted a 9-month notice period.

**Reasons:** In setting the award at only 5 months, the trial judge had put too much emphasis on the length of service factor and failed to give sufficient weight to the character of employment and availability of similar employment. The TJ compared Love’s case to other cases with a similar length of service but those cases were not similar on the other factors. They failed to take into account his senior level and executive character of his employment. CA also criticized the TJ for focusing on the fact that Love did not supervise or manage other workers and said that this was a narrow view of what constituted a managerial employee entitled to the upper amount of reasonable notice. TJ failed to place sufficient weight on other facts such as that Love reported to the CEO and was one of 9 owners of the company. All these factors pointed to his high status in the company and favored a longer notice period.

* TJ also failed to give consideration to the availability of similar employment. Love’s substantial annual compensation and perks at the company was going to make it very difficult to find similar employment with a similar level of compensation. CA said this pointed to a longer notice period.

**Ratio:** Character of employment should be given it’s due weight. Particular, we need to recognize the high character of employment of an employee and reward it with a suitably longer notice period than might be suggested just by the other factors.

#### Length of Service

* At common law, the longer the service the longer the notice entitlement but there is no rule of thumb. Length of service is just one factor. It is therefore more complicated at common law than it is under the *ESA*
* Usually you can start with this factor by assuming 1 month per year of service and then bumping up or down based on the other factors.
* Inducement is an issue related to length of service. Courts have extended the notice period when an employee had been induced to leave their previous job to join the employer who is now terminating them. Can also be referred to as a “lurement”. Courts said this justifies a longer notice period.

#### Employee’s Age at the time of Dismissal

* Assumption is that older workers will have a more difficult time finding alternative employment than will younger workers
* 50 is the point that courts consider the employee to be older and entitled to more notice
* The factual assumption underlying this factor has not been challenged in the courts

#### Availability of Similar Employment

* This factor looks at the labour market that the dismissed employee will be entering and searching for another job and looks at the skills the employee will be bringing to the job search
* An employee with highly specialized skills will likely be expected to have a harder time finding another job than would an employee with skills that are in high demand
* There is some uncertainty as to whether courts should consider the particular labour market considerations when weighing this factor. Some cases, courts have added an extra month or 2 to the notice period in difficult economic times recognizing that it might take a little longer than normal for the employee to find similar employment but there is not clear statement as to whether or how the strength or weakness of the economy should be a factor.
* However, we do know that the employer’s financial situation should not be assessed in determining the length of reasonable notice. The award should not be reduced to give a break to the employer who may be struggling financially

#### Irrelevant Factors

* Employer’s financial position
  + Confirmed by CA in *Mikayla and St. Thomas of Villa Nova Catholic School*
    - The lower court had reduced what would have been reasonable notice period explicitly acknowledging the poor financial position of the employer who had to terminate the employees.
    - CA overruled this
    - **Facts:**  Three teachers worked at a private school. Enrollment was down so the school informed these 3 teachers that their contracts would not be renewed for the upcoming academic year. All three sued for wrongful dismissal and sought 12 months reasonable notice. One had their contract renewed for 13 years, one for 12 and one for 8.
    - It was first determined that they were indefinite term employees and therefore entitled to reasonable notice. Even though they were hired on a string of 1-year contracts for each academic year, the court found this to be like *Ceccol* and found them to be indefinite term employees.
    - **Prior Proceedings:** Motion judge originally ruled that 6 months would be the appropriate reasonable notice period. Judge settled on 6 months on the basis that the school was in a difficult financial position and the judge speculated about the availability of other teaching jobs. Judge said that if the plaintiffs were all awarded 12 months reasonable notice the employer would not be able to reduce its financial deficit which is what they were trying to do by terminating these contracts. He said he could consider the employer’s financial position under the head of “character of employment”. The motion judge also said that after a period of 6 months other teaching positions would presumable become available. Teacher’s appealed and argued that the employer’s financial situation was irrelevant to reasonable notice entitlement and that the motion judge was off based by speculating that these other jobs would become available.
    - **Reasons:** CA unanimously agreed that the factor of character of employment considers the nature of the position held by the employee such as their level of responsibility and the expertise required. Reasonable notice is intended to allow employees a reasonable amount of time to find replacement work and wrongful dismissal damages are designed to compensate employees for the loses they incurred during the reasonable notice period. The CA said the focus is on the circumstances of the wrongfully dismissed employee and not the employer’s circumstances. CA said the motion judge’s reasoning that there would be employment opportunities after the 6 month period was purely speculative and did not support a reduced notice period
    - **Held:** Appeal allowed, and notice period increased to 12 months
* Employee’s misconduct “near cause”
  + Some Canadian courts had been reducing the reasonable notice award where the employee had committed some form of misconduct that didn’t quite meet the standard of just cause at common law but that could be labeled “near cause”
  + Can sometimes be referred to as the “doctrine of moderated damages”
  + *Dowling v City of Halifax* (1998, SCC)
    - SCC killed the idea of “near cause misconduct”
    - Near cause is not relevant to the assessment of the *Bardal* factors

## Termination of Employment: Just Cause for Dismissal at Common Law

* Can sometimes be referred to as summary dismissal because the employee is dismissed without notice
* Where the employee’s conduct amounts to just cause for dismissal, the employer has no obligation to provide notice for dismissing the employee
  + This is one of the limits of the implied term of reasonable notice. It does not apply where the employee has committed conduct that is considered just cause at common law
* Just cause is a defence to a wrongful dismissal action that is brought by an employee
  + A wrongful dismissal action is a claim for breach of contract and the breach of contract in a wrongful dismissal case is the employer’s failure to provide adequate notice. How much notice is adequate will depend on the terms of the contract. We know that where the contract is silent, the amount of notice required is reasonable notice
* An employer might defend a wrongful dismissal action on that grounds that it had no obligation to provide any notice because the employee’s conduct amounts to just cause for their dismissal
* Because of the seriousness of being dismissed without notice, the court’s have developed a relatively high threshold for finding just cause

### McKinley v BC Tel (SCC, 2001)

* This is the leading case on just cause

**Facts:** McKinley was a chartered accountant who worked for BC Tel. He suffered from high blood pressure and had some related health issues. His doctor told him to take a leave of absence from work and the employer accommodated that leave so that he could attend to his health issues. There was some back and forth where he attempted to return to work, required some accommodations and this went on for some time. At some point, McKinley’s doctors told him that he may be able to return to work if he took a drug called a beta blocker, at the time an experimental drug which helped with high blood pressure. McKinley refused to try the beta blockers and he didn’t disclose this option to his employer. Instead, he asked that his employer accommodate his health issues by returning him to work in a less stressful position. The employer declined to offer an alternative job and instead, terminated his employment contract without notice. McKinley sues for wrongful dismissal.

**Prior Proceedings:** At trial, the employer argued that it had just cause to dismiss McKinley because he did not disclose the doctor’s advice to return to his old job while taking the beta blocker. The employer’s argument is that McKinley’s dishonesty about his condition and the options available to him amounted to just cause for his dismissal

**Issue:** Was the dishonesty, the withholding of the medical information, sufficient to justify summary dismissal? Was there just cause for dismissal without notice? As a matter of law, the issue was whether dishonesty of any degree by an employee is just cause for their dismissal.

**Employers Argument:** Employer pointed to line of cases which suggested that dishonesty of any degree by employee is just cause for their dismissal because honesty and trustworthiness are integral to the relationship that without the ability of parties to trust each other,by no relationship cannot properly function. However, there was also another line of cases which said that not all acts of dishonesty amount to just cause.

**Held:** The employer’s defence of just cause was not established. McKinley was awarded 22 months reasonable notice. **Note:** This case was decided after *Wallace* but before *Honda Keys*. Wallace created a new basis of extended reasonable notice damages and Keys overruled this decision. The 22 months here included a *Wallace* bump up. The SCC also overturned the TJ’s award of both aggravated and punitive damages.

**Reasons:** It depends on the context and the circumstances of the dishonesty. The underlying issue was whether dismissal without notice is a proportional response to the employee’s dishonesty.

* “I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.”
* “Underlying the approach …. is the principle of proportionality. An effective balance must be struck between the severity of an employee’s misconduct by considering the sense of identity and self-worth individuals frequently derive from their employment.”
  + This balancing act is necessary given the vulnerability of employees especially at the time of dismissal. The court must look at all of the facts of the case including the degree and nature of the dishonesty along with any aggravating or mitigating factors and decide each case on its own facts without adopting any clear cut rules.
* While McKinley was not completely straight forward with his employer, his dishonesty did not rise to the level of a dishonesty or untrustworthiness that was incompatible with the continuation of the employment relationship.

**Significance:** This case shows that this contextualized approach is not meant to apply only to cases where the employee was dishonest but to all cases of just cause. Therefore, what we should be asking is whether the alleged misconduct amounts to a breach of contract or a breach of an implied obligation the employee owes under the contract. The way to read this case is that it puts the contract of employment at the center of the inquiry. This is the basis for what is the proportional response – has there been a breach of contract that undermines the relationship. Does the conduct interfere with the core of the contract of employment? You must look at what the parties agreed to, what the contract of employment required of the employee, the employee’s responsibilities, what the employee owed to the employer, what the employer’s reasonable expectations were under the contract etc.

**Ratio:** Dishonesty in itself is not necessarily automatically cause for summary dismissal. Also stands for the principle that court’s must adopt a contextual approach and consider the degree of the misconduct and the circumstances surrounding it in all cases of alleged just cause. Established a two-step test:

1. Did the employee engaged in misconduct that breaches an implied or express term of the contract?
   1. The standard here is the balance of probabilities, though, courts will use a sliding scale when it comes to the standard of proof and wehre the conduct that is alleged to amount to just cause ahs a criminal or quasi-criminal character to it, the court may insist on something higher than the balance of probabilities.
2. Did the employee’s breach give rise to a breakdown in the employment relationship?
   1. Generally, only serious misconduct that causes the employer economic or reputational harm or harm to the employer’s business interests is going to be upheld as just cause
   2. Courts will look at length of service, the employee’s past record, whether the conduct was premeditated or provoked, the employee’s personal circumstances and any other circumstances that may shed light on the employee’s behaviour and it’s consequences for the employer
   3. Courts have said that we need to consider the context and the circumstances

## The Contextual Approach

* Nature of the employee’s misconduct
  + Where there is a criminal or quasi-criminal nature to the conduct the court may insist on a higher standard of proof. However, then, once established, the fact that it is criminal in nature and so presumable has an element of intentionality or blameworthiness about it and is of a criminal nature may make it more likely to amount to just cause
* Nature of the employee’s position
  + Whether they held a position of trust or a high level of responsibility
* Nature of the employer’s business
  + Certain business may be bale to insist on higher standards of conduct (i.e. banks, services to children etc.)
* Off-duty conduct (is there a nexus?)
  + Conduct that occurs outside of the workplace and work hours can still amount to just cause
  + In these cases, courts will look for a nexus, or some kind of link or connection, between the off duty conduct and the employee’s responsibilities at work and the relationship
* Employee’s length of service and disciplinary record
* Contractual language and workplace rules
* Single incident or culminating event
  + Will look at whether it has been a pattern or behaviour
  + Will also look at whether there has been any progressive discipline or condemnation by the employer

### Belyea v Syncrude (ABQB, 2018)

**Facts:** B was employed as a crane operator for 10 years. B had received positive work evaluations but also had a history of aggressive behaviour at work. B was terminated in 2012 following a violent outburst in the lunchroom (B yelled at a junior employee who was sitting in his favorite chair and at one point through a chain at the other employee). The employer conducted a full investigation and concluded that B had committed just cause for the termination of his employment. The factors that the employer considered were Syncrude’s Treatment of Employees Policy, previous incidents of aggressive behavior for which B had been disciplined and B’s lack of remorse and refusal to accept any responsibility.

**Held:** Court concluded that there was just cause for the dismissal because B had “violated an essential condition of his employment contract and breached the trust necessary in his work relationship with Syncrude.

**Reasons:** The court said that B’s past incidents which had been disciplined meant that B new that he could be further disciplined if he continued to act aggressively. Mr. B was not very cooperative and he continued to be dishonest about the incident throughout the investigation.

**Note:** We can see how broadly the context is to be construed. The employees behaviour after the termination is also important. Here, the lack of remorse and the continued dishonesty and hostility during the investigation gave further evidence that the employment relationship was irreparably harmed and that he employer was justified in dismissing the employee having lost all confidence in the employee’s ability to be a productive member of the workforce. This contextual approach applies not only to dishonest but also to other forms of dismissal.

## After-Acquired Cause

* “It is now settled law that if a good cause of dismissal really existed, it is immaterial that at the time of dismissal the master did not rely or act upon it, or even did not know of its existence, or that he acted upon some other cause in itself insufficient. The main question always is, were there at the time of dismissal, facts sufficient in law to warrant it.”
  + *McIntyre v Hockin* (1889, ON CA)
    - Where an employer who dismisses someone, for example with no notice, if the employee brings a wrongful dismissal action the employer can rely on misconduct that it has discovered after the dismissal to support their defence of just cause or the employer could change the grounds for dismissal. So, suppose the dismissal was motivated by incompetence but then the employer later discovered the employee committed some theft, the employer could raise both incompetence and theft, or simply theft, to support the just cause defence
    - The idea is that he employee’s fundamental breach of contract relieves the employer of the obligation to provide notice. It does not matter that the employer only learns of it later on.
    - The fact that an employer can rely on new facts they learned after they dismissed the employee arguably creates an incentive for employer too keep investigating the employee right up until the date of trial if there is one. This rule is sometimes challenged on the grounds that it allows an employer a “fishing expedition” that they can dismiss and then try to find some dirt on the employee if the employee actually commences legal action. However, what the doctrine tells us is that even though an employer is not aware of the conduct at the time of dismissal but discovers it after the fact, it may still rely upon that conduct in their defence of just cause.

### VandenBoogard v Vancouver Pile Driving Ltd.

**Facts:** Mr. V was hired as a project manager for Vancouver Pile Driving in late 2011. He was hired into a senior management position and was responsible for the safety at a job site in a very high risk, safety sensitive and heavily regulated industry. His core duties included workplace safety, safety training and the enforcement of drug prohibition policies (keeping drugs out of the workplace). During his employment, he participated in the creation of the Core Values Statement for the company regarding safety and legal and regulatory risks that were relevant to the industry. He was dismissed without cause in February 2013, a little over a year after he started. His employer gave him 4 weeks pay in lieu of notice and the employer asked him to return his company cellphone. Mr. V sued Vancouver Pile Driving for wrongful dismissal but by this time, the employer had reviewed the records on Mr. V’s company cellphone that he had returned and they found a bunch of text messages sent by Mr. V soliciting illegal drugs from a number of people, including from an employee who worked under his direct supervision. Many of these were sent during working hours. In response to the wrongful dismissal claim, the employer raised the defence of just cause based on this information they acquired after the termination. At trial, Mr. V admitted that he had used the company cellphone to buy drugs from his direct subordinate and admitted that it was possible he had consumed illegal drugs with that employee after work. The employer argued that these actions amounted to a gross breach of his employment contract and that the employer therefore had just cause for termination and they argued that the misconduct undermined the safety of the jobsite and prevented him from properly overseeing the risk and safety management in the workplace as was required in his position.

**Held:** Trial judge agreed and said that asking direct subordinate to get drugs for him was incompatible with his duties as a project manager responsible for safety matters at this high risk jobsite and his misconduct went to the heart of the employment relationship. The court agreed that the employer had just cause for the dismissal. Mr. V appealed but the BCCA upheld the trial decision and said the misconduct here exhibited a serious lack of judgement in a safety centered workplace that justified the termination of his employment for just cause.

**Notes:** We can see the *McKinley* approach at work. The court looked at the circumstances, especially the nature of the employee’s work and his role in the company in assessing whether there was just cause. It is possible that if one of the lower level employees had committed the same misconduct there would not have been just cause. The key to his decision is the nature of his job because he held a managerial position and he as responsible for safety including safety risks created by drug use in the workplace. The nature of his position and his responsibilities were key on this contextual approach. The case also shows that employers may rely on employee misconduct that they discover post termination in support of their argument that the termination was for just cause. So, these dismissals can be upheld even though at the time the employee was dismissed they did not know about the misconduct but they discovered it after the fact and were able to rely upon it when they were sued for wrongful dismissal and were successful in establishing there had been no wrongful dismissal because Mr. V had committed conduct that when the employer later discovered it amount to just cause for the dismissal.

## Cumulative Cause and Progressive Discipline

* A single breach of contract by the employee can amount to just cause but generally it must be pretty serious. Most often, it will have to be willful so the court can conclude that the wrongful act strikes a foundation of the relationship of trust between the employer and the employee (cases like theft, fraud, violations of privacy, confidentiality or secretly competing against the employer, serious acts of violence or harassment, or safety violations).
* Sometimes an employer may be seeking to rely on an accumulation of less serious employee misconduct rather than s ingle wrongful act. This is known as cumulative just cause or single culminating incident.
* A reach of contract that would alone not be cause for dismissal can serve as the proverbial straw that breaks the camels back if the employee has committed previous similar breaches of the employment contract.
* Requirements to make out a cause of cumulative cause or culminating incident:

1. The employee was given clear and express warnings about their performance or their behaviour
2. The employee as given a reasonable opportunity to improve after the warnings.
3. The employee failed to improve notwithstanding being given a fair chance.
4. The cumulative failings of the employee armed the employer’s business.
   * *Atkinson v Boyd, Phillips & Co* (1979, BCCA)

* The test imposes on employers a duty to warn an employee if the employer intends to rely on cumulative just cause. They have to provide the employee with warning and a period of time to alter their behaviour. The duty to warn incorporates a corrective theory of discipline based on the notion that employers should attempt to correct performance problems using corrective discipline before jumping to the ultimate sanction of termination without notice. For this reason, the consistent application of a progressive discipline policy will improve the likelihood of summary dismissal being established based on a cumulative cause.
* In the unionized context, collective agreements almost always include progressive discipline policies. If they don’t, arbitrators deciding discharge cases under collective agreements have read one in
* A progressive discipline policy requires that employers use lesser forms of discipline starting with warnings before ultimately dismissing the employee
* Not that common to find progressive discipline policies in individual contracts of employment but they are starting to appear more often in employment contracts and ancillary documents

### Laszczewski v Aluminart Products Ltd.

**Facts:** After just 3 months the employer had dismissed Mr. L for several incidents of abusive conduct towards subordinates. Mr. L was hired into a managerial position which required management of unionized employees, something he had not done before. The employer turned out not to like his managerial style and found him to be rather harsh, rather abusive and to not be familiar with the expectations of employees working under a collective agreement in a unionized workplace. However, the employer did not give Mr. L any training on how it would like the workers to be managed or how to deal with employees represented by a union and governed by a collective agreement. They did not bring all of the complaints about Mr. L’s behaviour to him so Mr. L was not aware that his conduct was inappropriate and he was not given an opportunity to correct the behaviour. The employer did have a progressive discipline policy but their failed to follow it.

**Held:** There was no just cause. There had not been sufficient warnings and an opportunity to change. This opportunity would have required a clear communication as to what the expectations would be such as providing him with the necessary training. The employer jumped the gun and the dismissal was not for just cause.

**Reasons:** “Aluminart did not follow it’s own written policies when it dealt with Mr. L. Progressive discipline was not even attempted. A number of the complaints were not even mentioned to him. Most were not the subject matter of any informal employee written reports which were discussed with him. Instead, Aluminart acted in a precipitous fashion in regard to a senior employee whose style offended the sensitivities of HR professionals included. Mr. L was emigrated from Poland and having never worked in a unionized environment was unfamiliar with the do’s and don’ts. While he as handed a copy of the collective agreement no attempt was ever made by Aluminart to train him in dealing with unionized employees.”

* Particularly with something as subjective as management style and with conduct that can be traced to personality or cultural differences or a lack of training, the courts will look for the employers efforts at progressive discipline before finding the conduct amounts to just cause.

## Condonation

* “When an employer becomes aware of misconduct on the part of… a servant, sufficient to justify… [a just cause] dismissal, he may adopt either of two courses. E may dismiss, or he may overlook the fault… If he retains the servant in his employment for a considerable time after discovering his fault, that is condonation, and he cannot afterwards dismiss for that fault without anything new.”
  + *McIntyre v Hockin* (1889, ON CA)
* this is like a form of promissory estoppel. By not objecting to the misconduct that might be a breach of contract or may be part of a pattern that could amount to just cause, the employer is sitting on it’s rights and suspends it’s rights to rely on this misconduct down the road unless the employer provides notice of its intension from that at some point from this point onward they intend to rely on the behaviour.
  + For example, if an employee is chronically late for work and the employer is aware of that and they do not do anything about it they will not be able to rely on a string of lateness’s, no matter how long, to justify the just cause until it puts the employee on notice that the lateness is unacceptable. One incident of lateness will not be sufficient to show that when it became aware of the lateness it started to issue warnings and implement progressive discipline such that it would amount to cumulative cause.
* There is no precise amount of time that will give rise to condonation. Courts will look at all the circumstances to determine whether the employer objected within a reasonable time.

## Common Grounds for Dismissal

* There is no universal set of grounds for just cause. It is not like human rights legislation where you have to pigeon role yourself into a category

## Dishonesty and Conflict of Interest

* Not every form of dishonesty will give rise to just cause for dismissal (*McKinley*)
* One of the key issues is the employees’ position. If they have a lot of autonomy, are in position of authority or are in positions of special trust) bank employees, working with children etc.) they may be held to a higher standard
* Theft and fraud are other forms of dishonest conduct tat might give rise to just cause dismissal.
* Employer will typically have to establish that the employee’s fraud was intentional and not just an oversight or the result of an honest mistake in belief
* Conflict of interest refers to the general duty on the part of employees. Employers can reasonably expect their employees do not compete with the employer, for the employee to not otherwise pursue their own personal gain at the employer’s expense
* The more intentional, the more blameworthy it is

## Incompetence and Safety Violations

### Balzer v Federated Co-operatives Limited (SKCA)

**Facts:** Mr. B was dismissed for cause after 6 years on the basis of serious violations of the employer’s safety rules. Mr. B had received extensive safety training as a Propane Coordinator and knew that violating the safety rules could lead to dismissal. He had no prior incidents of misconduct or discipline until this incident which led to dismissal. What happened was that one morning, while filling his truck with propane he violated several safety rules. As a result, there was a propane leak that lasted for about half an hour letting an estimate of about 500 liters of propane into the environment. During the leak, Mr. B left the property to find a wrench, he left a gate unsecured and he did not report the leak to anyone. Even after he came up a solution for the leak, he then left for lunch and still did not report the problem to management even though there was a risk that the leak could resume. When the employer learned about this, they terminated him for cause on the basis that he had violated 5 different safety rules and he caused a significant risk to himself, to others and to the environment

**Held:** Applied the *McKinley* approach and found that the dismissal was proportional to the misconduct.

**Reasons:** Mr. B violated known safety protocols and his actions resulted in a very dangerous situation. He did not take the situation seriously. There were no mitigating factors that explained or justified the breach of the safety protocols. Even though it was just one incident in an otherwise good 6 years of service, the court found that the actions were sufficient to amount to just cause.

**Ratio:** Where safety is an issue and where the employee creates a significant safety risk to themselves or others (or in this case the environment), courts are more likely to hold that as just cause, particularly wehre the employee was clearly aware of the rules and evidenced such wanton disregard for the rules and there was nothing to be said in his defence.

### Babcock v C&R Weickert Enterprises (1993, NSCA)

**Facts:** Mr. B was hired as a manager of a Canadian Tire store in 1990 and the store initially did well under his management but then things started to go off the rails. In October, the owner of the store received a report from an externa consultant saying that senior employees had lost confidence in Mr. B’s ability to effectively manage. The employer approached Mr. B about this and emphasized that it was necessary for Mr. B to address the performance problems raised by this consultant report. The employer told him his performance would be reviewed in the new year. Mr. B took his vacation at the beginning of the new year (January 1991) and in his absence, the managers held a meeting, and it was agreed Mr. B was not performing his job adequately. They decided they would give him a 45-day period to improve but then when he returned a few weeks later, he was dismissed outright and was not given the 45-day period to improve.

**Issue:** Was there cause for his dismissal?

**Held:** CA said no just cause based on the performance issues, in order to find just cause for dismissal, the onus is on the employer to demonstrate that Mr. B had been warned that his performance must improve otherwise he would be dismissed.

**Reasons:** The court said that the employer would have to further show that Mr. B understood the warning and that he as given a reasonable opportunity to improve these deficiencies in his performance. CA said he had been warned and he understood it, but they failed to give him reasonable time to improve. It had only been a few months between the warning and the dismissal and this few months included the busy Christmas season so that would not give him any time to take on additional training or try out different management tactics and it also included his scheduled vacation time. Court also noted that the employer initially decided to give him a 45-day period to improve his behaviour but then they didn’t. But, the court said the fact that they contemplated giving him this 45 day period meant that the employer recognized that they should have given him an opportunity to improve his behaviour.

## Insolence and Insubordination

### Henry v Fox Co Ltd.

**Facts:** Henry was fired after 7 years of employment without notice. One day, Henry’s supervisor, Graham, asked Henry why he was taking so long to do a particular task and told him to hurry up. Henry got upset with Graham and asked him what his problem was. Graham told Henry he could quit if he wanted. Henry responded by saying that he could fire him if he wanted and he repeated this several times. Graham fired him. Henry sued for wrongful dismissal. Employer raised defense of just cause on the basis of Henry’s insolent behaviour (talking back)

**Held:** Henry’s behaviour did not amount to just cause. Wrongful dismissal action successful and awarded 6 months reasonable notice.

**Ratio:** A single, isolated case of insolence would justify dismissal in only 3 circumstances: (1) it would have to be shown that the insolence destroyed the ability of the employee and supervisor to maintain a working relationship; (2) it would have to be shown that the incident undermined the supervisor’s ability to manage the workforce; or (3) if the incident caused the employer financial or reputation loss.

**Reasons:** None of those factors existed in this case.

* “The employer did not establish that Henry’s insolence led to irreparable harm to the working relationship. It did not establish that this incident rendered it impossible or impracticable for Mr. Henry and Mr. Graham to maintain a working relationship. There is no evidence to suggest that the verbal confrontation had an effect on Mr. Graham’s ability to supervise the workplace effectively or that the employer’s financial or business interest were prejudiced as a result of the incident. Many things are said and done in the heat of the moment that are regretted by all and this is one of those cases.”

## Harassment and Violence

### VanWoerkens v Marriott Hotels of Canada (2009 BCSC)

**Facts:** Mr. V was a Director of Sales and Marketing at Marriott Hotels. He worked there for a long time (22 years) with no incident. In December 2006, he was at the company’s holiday party in Vancouver and as a senior level employee he was expected to monitor alcohol consumption by the employees and make sure no one became too inebriated. One female employee at the party, M, became quite drunk and after the party, a group of the employees, including M and Mr. V, went to a hotel room to continue the party. When they were in the hotel room, M went into the bathroom, Mr. V followed her and groped her. A couple of weeks later, Mr. V phoned M at work and asked her out on a date asking her to meet him at a local bar to have a special meeting. M declined and reported the incidents to senior management. Management investigated the case and concluded that Mr. V had sexually harassed M and that the harassment was serious enough to provide ground for dismissal. Mr. V denied the allegation of groping in the bathroom, but the employer did not find his denial plausible.

**Held:** Employer did have just cause to terminate Mr. V without notice, there was just cause for the dismissal.

**Reasons:** These were two serious incidents of harassment. Following an obviously drunk and vulnerable employee into a bathroom and touching her without her consent and then trying to pursue a relationship with her amounts to just cause. He was in a position of power. The court also noted that Mr. V was dishonest in that he denied the hotel encounter incident but there were witnesses and he still denied it. The court said this dishonesty really undermined the employer’s trust in him. It did not matter that there was a progressive discipline policy in place or that Mr. V had a 22-year history of problem free employment. It also did not matter that he had been warned about his behaviour because this was serious misconduct. The sexual harassment and the related dishonesty were serious enough to give the employer just cause for immediate dismissal.

## Absenteeism and Lateness

* Important to distinguish between culpable and non-culpable lateness and absence
  + **Non-Culpable:** If the lateness or absence is “non-culpable”, it is sometimes referred to as innocent absenteeism or lateness. The employee is not to blame. The absenteeism may be related to a disability or religious reasons, childcare, eldercare responsibilities etc. These types of absences cannot be disciplined. The *human Rights Code* prohibits an employer from sanctioning absences related to protective grounds such as disability, religion, or family status.
    - However, innocent absenteeism can result in the contract being frustrated. There is a duty on the part of the employer to accommodate things such as disability or religious beliefs that may cause the employee to be absent
* Generally, it will take several instances of culpable absenteeism for the employer to establish just cause
* Wehre the absenteeism is coupled with insubordination (e.g. an outright deliberate refusal to report to work when ordered to in accordance with the employee’s contractual obligations or if they lie about the reasons for the absence) the employer may have a stronger case and may be able to justify just cause based off of even one absence or lateness incident

## Off-Duty Conduct

* Just cause can include conduct that the employee does when they are not at work
* When the employee’s off0duty conduct potentially threatened the employers economic or reputation interests or interferes with the ability of the employee to perform their job then it might amount to just cause
* The court is going to be looking for a nexus, or a link, between the employee’s off-duty behaviour and some kind of prejudice to the employer’s legitimate business interests (could be economic, reputational or a general interference of the employee to perform what they are contractually obligated to under their contract)
* Finding this link may turn on the position or responsibilities of the employee so for example, immoral behaviour by a teacher or child counselor while off-duty may have a greater negative impact on the employee’s ability to work than it would if the employee was a fork lift operator
* Another issue that comes up with off-duty conduct is social media conduct
  + Employees can be dismissed for comments or photos they post on their social media accounts
    - I.e. Damien Goodard, who worked for Rogers Sportsnet, was dismissed when he made comments about gay marriage on Twitter.

### Kelly v Linamar Corporation (2005 ONSC)

**Facts:** Kelly was a long service, well respected, managerial employee. However, he was arrested for possession of child pornography that he accessed off hours on his home computer. The employer was very involved in the community and supported several local children’s organizations and the arrest of the senior level managerial employee for child pornography was widely reported in the local media. The employer felt it had no choice but to dismiss Kelly. Kelly brought an action for wrongful dismissal.

**Issue:** Did the arrest for possession of child pornography on his home computer constitute just cause for his dismissal?

**Held:** Yes, the off-duty conduct did amount to just cause. Court agreed with the employer’s position and upheld the dismissal for cause.

**Ratio:** The test is whether the employee’s behaviour threatened the employer’s business interests.

**Reasons:** In this case, the morally offensive nature of the misconduct and the notoriety it attracted in the local media combined with the employer’s role in the community as an advocate and support of children’s activities created that nexus. It provided the link between the off-duty misconduct and the employer’s legitimate business interests.

* “the employer argues that an employee in the position of Kelly who is required to work with the general community both with acquiring products and supplying products to customers who is required to manage, instruct and discipline people working under him and who is required to interact collegially with many peers at the management level has a duty to ensure that his conduct does not have an adverse impact on any of those activities. It is argued that permitting himself to be placed in a position wehre he would be charged with possession of child pornography which became almost immediately known to his management, peers, coworkers and people who reported to him, and which ultimately became known to the general public when, at a later stage, the identity of his employer was disclosed has failed to discharge the duty he has to his employer.”

## Termination of Employment: Resignation, Constructive Dismissal & Frustration

## Resignation

* Resignation is where the employee resigns or quits. Just as there is wrongful dismissal, there is wrongful resignation
* What makes a resignation wrongful is the failure to provide adequate notice (same thing as what makes a dismissal wrongful)
  + In determining how much notice one must give before they resign, we must begin by looking at the contract of employment
* Some provinces (not Ontario) have the notice period for resignation within their *ESA* and it is usually 1-2 weeks
  + Newfoundland and Labrador is the one exception because the notice required for employers to dismiss and for employees to resign is the same (ranges from 1 – 6 weeks depending on the length of employment)
* The Ontario legislation does not set a minimum for the amount of notice an employee must provide for resignation
* If the employee quits, the employer has no obligation to provide notice or pay in lieu of notice. The employee also gives up their right to notice and severance pay under the *ESA*
  + For this reason, courts have required that the resignation be a clear and unequivocal expression of the employee’s intention to resign
  + The test that the courts have adopted is objective – Would a reasonable person conclude that the employee had unequivocally and voluntarily resigned?
    - An employee who simply says that they are unhappy with their employer or even looking for another job, this will not amount to a resignation
    - If the employer gives the employee and ultimatum (quit or you are fired) then this is not considered to be voluntary and this will not be a resignation. The same goes for sudden frustrated statements made by an employee. In these cases, courts have said the resignation is not immediately effective. Instead, they have allowed for a “cooling off period” during which the employee may change their mind and take back what they said.

### Upcott v Savaria Concord (2009, ON SCJ)

**Facts:** Upcott was a manager with 8 years’ service with the employer. One day he was in a bad mood and was having a bad day. He had to fill in for an absent employee, then he had a confrontation with a coworker who complained about him to the Human Resources manager and when the HR Manager asked him about it, he responded in frustration saying “I’m done” and he threw his keys on the manager’s desk and took off. On his way out, he cleared off his desk and told several other employees he was done. In a phone call later, the employer told Upcott that they accepted his resignation and Upcott replied that he did not resign. He sued for wrongful dismissal.

**Issue:** Did Upcott resign or was he dismissed?

**Held:**  He had not resigned. Court found that the employer had dismissed him when it had later refused to allow Upcott back into the workplace. Court concluded that for a 54-year old managerial employee with 8 years’ service, the appropriate reasonable notice period would be 7.5 months. Upcott was awarded damages for wrongful dismissal for that amount.

**Reasons:** “The law is clear that where an emotionally upset and angry employee exclaims ‘I quit’, the issue of whether he/she has resigned is not clear cut. The law recognizes that such utterances may not constitute a valid resignation. Nor should such a declaration be accepted without question by the employer. Rather, the onus is on the employer to not accept such a spontaneous declaration without proper deliberation.”

* Court said the employer seemed to have rushed to treat Upcott’s actions as a resignation but what it should have done is to recognize that Upcott was having a “juvenile fit of anger” and the employer should have recognized it was just a spur of the moment thing and Upcott would soon calm down and return to work.

**Ratio:** When an employee quits, employer need to be careful not to snap up their resignation but instead, especially where there is a spontaneous outburst, that they allow for some cooling off period for the employee to change their mind and take back their resignation.

#### Wrongful Resignation

* The employee’s duty to provide notice comes from the implied common law duty to provide reasonable notice
  + This duty applies to both employers and employees
  + This is an implied term, but it is rebuttable. Therefore, we need to look at the contract of employment to see if the term has been rebutted. Have the parties included their own term regarding notice of termination?
* If the parties have agreed to the amount of notice required for resignation, if it is enforceable in all respects (must be supported by consideration etc.)
* Courts assess reasonable notice for dismissal using the *Bardal* factors. The idea behind these factors is to determine the time that the employee would be expected to find another job. Reasonable notice for resignation is the flip side of this. How long would it take the employer to find a replacement?
  + This might be a shorter period than it would take the employee, had it been a dismissal, to find alternative employment
  + A relatively low-skilled level factory worker or something who works as a cashier, a replacement may easily be found for these workers so this will point toa lesser amount of notice being required for resignation. How long is reasonable depends on the nature of the job because we are asking ho long it would take the employer to find a replacement.
* Some courts have said that ordinarily two weeks is appropriate, except for more senior management employees where the suggestion is that it is more in the range of 4 weeks.
  + Sometimes courts have found for a longer period of reasonable notice to be appropriate, even in the range of 10 months or a year. However, these are uncommon. What this does show is that it is unpredictable.
* If an employee gives working notice of their resignation. So, they say they plant o leave in 2 weeks and the employer responds by telling them to leave immediately, then the “quit” becomes a dismissal.
  + One way to think about this is as the employee offering to terminate the employment relationship with 2 weeks’ notice and the employer can either accept that or counteroffer. If they counter-offer with “leave now” then the employer is the one who terminates the relationship and they will be the one that owes reasonable notice of dismissal that is assessed on the *Bardal* factors which generally will be much longer than what the employee would have owed in terms of notice
* If the employee fails to give notice, the employer may sue for wrongful resignation, but the measure of damages is the harm that the lack of notice caused the employer. So, the measure of how much notice is reasonable is the time that it would take the employer to find a replacement but the assessment of damages is based on the actual cost, the expenses to the employer that flow from the employee’s failure to give notice of their resignation
  + The employer will need to recruit and train a new employee regardless of whether notice was given. The damages for wrongful resignation must be linked to the harm that was caused by the lack of notice. This includes losses that flow from the breach of contract such as the employer’s sudden loss of the employee’s production during the period until a replacement can be found, if an employer has to pay a temp agency a fee to send a replacement on short notice or if there are costs incurred as a result of temporary transferring an employee from another location. These are the costs that could be recoverable in a wrongful resignation case.
* The reality is that it is usually not worth it for the employer to actually sue for wrongful resignation. Even if there are losses that can be attributed to the employee’s failure to give notice, they are rarely so great as to justify commencing litigation.
* Remember, what we are asking for here are contract damages so the employer is asking to be put in the position as though the employee provided adequate notice. While the lack of notice may have cost the employer some expenses, the employer is also relieved of the obligation to pay the employee for what would have been the notice period of resignation so this needs to be offset in calculating any damage award (*Conseb v Walker)*
* Particularly in the case of a senior level employee who may be difficult to replace in terms of time and cost and maybe whose sudden departure causes losses for the company, it may be worth it for the employer to sue for damages

### Tree Savers Intl v Savoy (1992, Alta CA)

**Facts:** Two employees left together to go into competition with their employer. There wasn’t any restrictive covenant and no-noncompetition clause in place so that was not an issue. It was the resignation without notice that the employer sued for.

**Held:** Court found a longer period of notice to be appropriate for a resignation. They found 9 months was appropriate given the status and seniority of the employee. Resulted in a damage award as a result of the employee’s failure to provide notice of resignation.

**Reasons:** Court said that these were senior level employees and that meant a longer notice period for resignation. The court did not actually specify the amount, the range given was 9 months to 1 year. The court looked at the employer’s losses that flowed from the lack of notice and set them at $73,000 per employee. These were costs related to recruitment, including travel and expenses to find replacementsto .

### Consbec v Walker (2016, BCCA)

**Facts:** Walker quit his position without notice after 5 years’ service. As a result of the sudden resignation, the employer had another employee relocate from Sudbury, ON to Kamloops to take over Walker’s position for 1 month and then later had a different employee permanently relocate from Sudbury to Kamloops. The employer sued Walker for breach of contract for wrongful resignation based on the failure to provide notice and claimed that walker should have to pay for all of the expenses the employer incurred as a result of the resignation without notice.

**Held:** The court said it would take about 1 month for the employer to hire a replacement, but the award is not 1 month’s salary. But, employer’s cost was lower than it’s saving and therefore, the employee was not liable for anything.

**Ratio:** In deciding the amount of notice, courts need to consider the employee’s duties and responsibility, salary, length of service and the time it would reasonably take the employer to have others handle the employee’s work or to hire a replacement. In order to assess damages, the employer needs to demonstrate it has suffered losses as a result of wrongful resignation and that those losses exceeded the amount of money it saved from not having to employee’s Walker’s wages for that 1 month notice period.

**Reasons:** The award is not 1 month’s salary because we are not trying to compensate the employee’s lost income, but instead the losses the employer suffered because of the employee’s breach of contract. Walker earned $6, 000 a month. The expenses the employer incurred in bringing in a temporary replacement which included his transportation and hotel and food, were $5,875. The court said that the employer could not claim the cost of moving the permanent replacement because the cost of finding a permanent replacement were not linked to the lack of notice. If notice had been given, the employer would still need to find a replacement. The employer’s cost was less than it’s savings. The cost of bringing in a temporary replacement on no notice was $5 875 but Walker’s earning during that period would have been $6,000. So, in the end, the employer’s cost was less than it’s savings. Employer had no damages to claim and so the employee was not liable for anything.

### RBC Dominion Securities v Merrill Lynch (2008, SCC)

**Held:** The notice period for resignation by senior management of investment was found to be 2.5 weeks. The court accepted the employer’s losses in this 2.5-week period to be equal to a $40,000 per employee damage award.

## Constructive Dismissal

* Looks like a resignation but it is a forced resignation so not a true voluntary, resignation by the employee
* It is a dismissal, but it is not an outright dismissal. It is as though the employee was dismissed. While it looks like a resignation, it is deemed to be a dismissal and a dismissal without notice is a wrongful dismissal. Therefore, a constructive dismissal without notice is also a wrongful dismissal.
* When an employee sues for constructive dismissal, they are suing for wrongful dismissal, but they must establish the additional element of the cause of action, showing that the employer’s conduct should be deemed a dismissal
* Constructive dismissal is based on the idea of a repudiation of the employment contract. A repudiation of contract occurs when a party behaves in such a way that demonstrates that they no longer intend to be bound by the terms of the contract. When this happens, the innocent party can elect to treat the contract as having been terminated which entitles that party to claim for damages for any loss resulting from the breach and relieves them of any obligation to continue to perform under the contract. The repudiatory contract does not automatically bring the contract to an end, it depends on how the innocent party responds. There will only be a constructive dismissal when the employee accepts the employer’s repudiation and they do that by resigning .It is important that the employee makes it known to the employer that they are accepting that the employer is treating the contract as at an end. If the employee doesn’t and they just keep working under the new conditions, a court may find that the employee has condoned the employer’s breach. In this case, it would be as if the employee implicitly agreed to the change.

### Farber v Royal Trust Co (1997, SCC)

**Facts:** Farber was a regional sales manager and supervised 21 offices and over 400 employees. The employer restructured and then eliminated Farber’s position. The employer offered Farber his previous position as a manager of just 1 single branch and it was not a good branch. They also changed his pay structure saying that it would not be based on commissions alone. Farber figured that this would basically amount to a 50% pay cut by going to commissions and being assigned to a single branch that did not perform well. Rather than reporting for the new job he quit, and he sued the company for constructive dismissal. As it turned out, that single branch did perform better than Farber thought it would and sot he pay cut would not have been as much as he thought it would be.

**Held:** There had been a unilateral and fundamental change in Farber’s employment contract and so Farber was justified in considering himself to have been constructively dismissed. He was awarded 12 months reasonable notice.

**Ratio:** SCC set out the test for constructive dismissal. The relevant time period is at the time of the change, it doesn’t matter what happens after.

**Reasons:**

* “Where an employer unilaterally makes a fundamental or substantial change to an employee’s contract of employment – a change that violates the contract’s terms – the employer is committing a fundamental breach of contract that results in its termination and entitles the employee to consider himself or herself constrictively dismissed.”
  1. It is not just any change, it needs to be significant, fundamental or strike at the core the relationship
  2. SCC said it was well established in the case law that demotion to a less prestigious position could amount to a constructive dismissal. The court said that at the time the offer to transfer him to his old job was made, it was reasonable for Farber to think this was a major change to his compensation and that is the time that is relevant, at the time of the change. It didn’t matter that the branch did not suck as much as Farber thought it would. What happened after he quit was irrelevant since how was he to know that the branch would unexpectedly perform well.

#### Elements of the Cause of Action

* The onus is on the employee to establish that there has been a constructive dismissal
* *Potter v New Brunswick Legal Aid*- the SCC recognized two types or branches of constructive dismissal
  1. Employer behaviour that may not breach a term of the contract but that makes continued employment intolerable.
  2. Substantial breach of an essential term of the contract
     + This branch just restates the *Farber* test

#### Substantial Breach of an Essential Term

* Under this branch, to establish a constructive dismissal, the court will ask these three questions:

1. Did the employer breach an express or implied term?
   * This involves identifying an express or implied term that has been breached
2. Was the breach “substantial” and detrimental to the employee? Would a reasonable employee in the employee’s circumstances conclude that the employer’s breach of contract has substantially altered an essential term of the contract?
   * Courts apply an objective test here
   * Here we are looking at the extent of the change – was it substantial?
   * This question is usually the focus
3. Did the employee “accept” the repudiation and treat the breach as having terminated the contract?

* Some of the types of changes:
  + Changes to compensation
    - We saw this in *Farber* – one of the changes was to his compensation structure and Farber believed that this was going to result in a significant pay cut
    - Generally, a pay cut of 15% or more will almost certainly count as substantial. When it is less than 15% it depends on the circumstances.
      * Courts have said if the cut, which is less than 15%, is the result of genuine financial difficulties faced by the employer, it might not count as a substantial change that could give rise to a constructive dismissal
  + Changes to positions and responsibilities
    - An employer may want to reassign an employee to a different position as we saw in *Farber*, and in asking whether such a reassignment amounts to a constructive dismissal, the first thing you need to ask is whether the contract of employment gives the employer that right. Does the contract give the employer the right to reassign the employee to a new position? Because some contracts will have such a clause.
    - Even without such a clause, courts have recognized that employers have an implied right to make reasonable changes in assignments and job responsibilities as needed. It may eb regarded as part of the implied term of managerial prerogative. Courts have said that as long as the employer acts in good faith and in legitimate business reasons, the employer can make changes, within reason, to the employee’s position
    - A change that amounts to a demotion is more likely to be found to be a constructive dismissal, especially if there are not only changes to the job responsibilities In the job title but also to the reporting structure an the level of prestige attached to the position (*Farber)*.
    - Remember, it needs to be a substantial change. Minor changes to responsibilities, if they are within the employee’s skill set for which they are hired and not a major change in their role in the company, they will generally not admit to constructive dismissal
    - Generally, lateral changes are not considered constructive dismissal if they are within the general skillset for which the employee was hired
    - If the employer does want to make changes to the employee’s position or some other aspect of the job, the employer has the option to terminate the contract and offer the new terms as a new contract. As long as the employer terminates the existing contract with adequate notice, then it will not be liable for wrongful or constructive dismissal because it is not a change to the contract but an offer of a whole new contract which the employee can accept or not.
      * Where this happens, the employee’s years of service will not go back to 0
  + Change in work location
    - Where the employer is moving or wants the employee to move to a different location, what is a reasonably exercise of the employer’s implied right to make changes will depend on a number of factors:
      * Is it in good faith?
      * Is it a legitimate business reason?
      * If not, this will amount to constructive dismissal
    - It also depends on the nature of the job. In some jobs, relocation is more common and to be expected so this would also be considered
  + Leaves of absence and suspensions
    - This is where the employer orders the employee to not report to work for a period of time. This could be for disciplinary reasons, i.e. wehre the employer imposes a disciplinary suspension on an employee, a temporary layoff. Disciplinary suspensions are usually without pay.
    - There are also adminsitrative suspensions which are periods of time when the employer orders the employee not to report to work but it is not a lay-off and the employee is not being punished for anything. Adminsitrative suspensions are with pay if the employer wants to avoid a claim of constructive dismissal.
    - Layoffs
      * If there isn’t an express or implied term in the contract entitling the employer to layoff an employee, a layoff without pay is most likely going to be found to be a constructive dismissal.
    - Disciplinary suspensions
      * Courts have held that a short paid suspension is ok but an unpaid suspension will usually amount to a constructive dismissal but it depends on the terms of the contract
      * The CA considered whether there could be an implied term permitting unpaid, disciplinary suspensions in the contract and they concluded that there was not (Carscalan v *FRI Corp* (2006, ONCA)
        + In this case, the court refused to read such a term in saying it wasn’t necessary to give business efficacy to the contract.
        + **Facts:** Case involved an employee who was required to do something that night (ship material to her boss who was at a conference overseas). She failed to do that, and the employer was mad so they suspended her indefinitely. She sued for constructive dismissal. One of the employer’s arguments was that there was an implied right to discipline the employee for poor performance and that they could do that by an unpaid suspension.
        + **Held:** Court rejected this argument. Employee succeeded in her claim for constructive dismissal and she was awarded reasonable notice in the amount of 9 months.
        + **Reasons:** if the employer wants to have that right, it has to be expressly agreed to in the contract. The employer also argued that the failure to perform the task amount to just cause and the CA rejected this argument too saying that this one incident was not serious enough to amount to just cause for dismissal.
    - Adminsitrative suspension
      * Sometimes referred to as “adminsitrative leave of absence” and occurs when an employer orders an employee not to come to work but it is not because of a shortage in work or some other interruption in the workplace and it is not disciplinary in nature. An employer may order one of these leaves wehre it wants to investigate a complaint it received about the employee or where the employer otherwise has reason to believe the employee committed some misconduct.
        + Courts have held that an employer does have the right to order an adminsitrative leave but it has to be with pay. They also said it cannot be for just any reason, it must be for a reason connected to the employee’s ability to perform the work or otherwise connected to some legitimate business interest.

E.g. where you have an employee that is accused of theft or harassment, the employer may be justified in ordering the employee not to report to work for a while pending the investigation but if the leave or suspension is without pay, that employer is at risk for liability for constructive dismissal. Employer cannot withhold the pay during the administrative suspension but the adminsitrative leave or suspension itself is not a constructive dismissal.

* + - * *Potter* (2015 SCC)
        + **Facts:** Court had to decide whether the employer had constructively dismissed Potter by placing him on a paid adminsitrative suspension while it attempted to bargain a buy out of the employee’s fixed term contract.
        + **Ratio:** An employer does have a right to place an employee on a paid adminsitrative leave if it does so in good faith and if the leave is both reasonable and justified in the circumstances
        + **Held:** Employer failed to show that it was reasonably and justified in the circumstances.
        + **Reasons:** the employer had not been honest with the employee about the reason for the leave and there was further bad faith because the employer was just looking for ways to terminate the contract and so they were looking into ways they could build a case for just cause against the employee

#### Employer Behaviour that Makes Continued Employment Intolerable

* This is employer behaviour which may not breach a term of the contract but makes continued employment intolerable
* This branch will make it easier for victims of harassment and bullying in the workplace to make out a common la claim of constructive dismissal, they don’t have to have an additional burden of having an implied term that they would be free from harassment and bullying in the workplace

### Shah v Xerox Canada (2000, ONCA)

**Facts:** Employee suffered from harassment and false allegations from her employment for about 6 months until she could not take it any longer.

**Held:** Employee had been constructively dismissed.

**Ratio:** Court carved out an exception. To make out a case of constructive dismissal, it was not necessary for the employee to point to a breach of a particular term in the contract. If the employer’s conduct makes continued employment intolerable, judged on a reasonable person standard, then there has been a constructive dismissal.

### Colistro v Tbaytel (2019, ONCA)

**Facts:** Employee was able to make out a claim of constructive dismissal based on employer’s decision to rehire a man who had sexually harassed her in that workplace years earlier. She objected but the employer just offered to transfer her to another office. She did not like this and quit.

**Reasons:** Employer knew hiring this guy was going to cause employee severe trauma and it would render continued employment intolerable.

**Held:** There had been a constructive dismissal. The employee got 12 months reasonable notice damages plus an addition$100,000 in damages because of the employer’s bad faith conduct.

### Wronko v Western Inventory (2008, ONCA)

**Facts:** Wronko was the VP of National Accounts and Marketing and he had worked for the employer for 17 years. His contract of employment entitled him to 2 years salary plus bonus upon termination. When a new president took over, he attempted to change the employment contract to provide for 3 weeks pay for each year of service to a maximum of 30 weeks. Wronko refused to accept the employer’s proposed amendment. They could not come to an agreement so the employer gave him 2 years notice that the provision in this contract would be amended unilaterally. Wronko never agreed to the change but he was given notice of the employer’s intention to change the term with or without his consent in 2 years. After the 2 years, the employer sends an email to Wronko saying that the change is now enforced and that the contract had been amended and that if he still did not agree to the change then there would not be a job for him. Wronko considered himself constructively dismissed. Wronko requested his 2 years salary in accordance with the termination provision in his contract. The employer refused ad Wronko sued for wrongful dismissal.

**Prior Proceedings:** The trial court held that the employer had a unilateral right to amend the termination clause in the employment contract because Wonko was given the requisite notice of the change. Therefore, Wonko has resigned, he had not been dismissed.

**Held:** Disagreed with trial court. Instead, they awarded Wronko the 2 years of pay in accordance with the termination provision.

**Ratio:** This case set out the options that are available to an employee who believes they have been constructively dismissed as well as the legal consequences of each of those options. “First, the employee may accept the change in the terms of employment, either expressly or implicitly through apparent acquiescence, in which case the employment will continue under the altered terms. Second, the employee may reject the change and sue for damages if the employer persists in treating the relationship as subject to the varied term. This course of action would now be terms a “constructive dismissal.” Third, the employee may make it clear to the employer that he or se is rejecting the new term. The employer may respond to this rejection by terminating the employee with proper notice and offering re-employment on the new terms. If the employer does not take this course and permits the employee to continue to fulfill his or her job requirements, then the employee is entitled to insist on adherence to the terms of the original contract. In other words, if the employer permits the employee to discharge his obligations under the original employment contract, then – unless proper notice of termination is given – the employer is regarded as acquiescing to the employee’s position.”

* In other words, the employer does not have a unilateral right to change a contract. An employer can’t attempt to make such a change by forcing an employee to either accept the change or quit

**Reasons:** The employer cannot unilaterally change a fundamental term of the contract if the employee does not accept that change. Wonko was effectively terminated by that email. Wonko was also not under a duty to mitigate because the termination provision provided him with a lump sum payment, not salary continuation.

**Note:** What the employee did right in this case is that he made his objection known and he maintained it throughout the supposed notice period (the 2-year period during which the change was proposed). What the employer did wrong is that they maintained the position that this was a change in terms rather than a termination of one contract and an offer of another. An employer could give notice sufficient to terminate the existing contract and offer a new contract to take effect at the conclusion of the notice period. However, in this case, the termination provision entitled Wronko, not to notice, but to a lump sum payment equal to 2 years pay so the contract did not provide for a term with respect to working notice. The employer could have paid off the first contract, given Wronko 2 years pay, then offered a new contract. Then it would not have violated the first contract and then Wronko could have been put in the situation of deciding whether to accept the new contract

## Frustration of Contract

* Different from dismissal or resignation because it is a termination of the relationship that is brought about not by the agreement of the parties or the actions of either party. A frustrated contract comes to an end because something unexpected has happened that prevents one or both of the parties from doing what they promised to do under the contract
* The effect of frustration is to relieve both parties from their contractual obligations so there is no obligation to provide notice of termination when a contract is frustrated.
* How frustration comes up in employment law is usually in the context of a wrongful dismissal action. The employer defends the action by saying that the contract had been frustrated and as such, the employer did not owe any notice
* Some things that DO NOT amount to frustration because they are all foreseeable events are:
  + Bankruptcy
  + Economic downturn
  + Strikes
* Frustration of contract most frequently is raised by the employer where the employee becomes ill or disabled. An employee’s illness or disability can frustrate the employment contract if performance in the future will be impossible or if it will be radically different from before. This will really depend on the circumstances of the case including the nature of the employee’s work, their role in the company and the nature of the disability and it’s duration.
  + It really comes down to an assessment of whether the employee’s disability is permanent rather than temporary, such that it will permanently or for the foreseeable future prevent the employee from returning to the job they were hired to perform
* The onus is on the employer to establish frustration. If the contract is frustrated, they do not need to provide notice
* Even a long absence from work due to an illness may not frustrate the contract unless the employer can demonstrate that a return to work is unlikely in the foreseeable future.
* Where the employer can establish that the disability is permanent, a finding of frustration can result even if it is only a short absence prior to the employer taking steps to bring the relationship to an end.
* In coming to a conclusion of whether a contract has been frustrated due to illness or disability, there are two additional considerations that may be raised:
  + (1) where the contract provides for sickness or disability benefits and
  + (2) what about the duty toa accommodate under HR legislation- when does this run out.

### Naccarato v Costco Wholesale (2010, ONSC)

**Facts:** The employee began to work for Costco in 1990 but he became depressed and began sick leave in July 2002. After 4 years, Costco stopped the long-term disability benefits and terminated his employment in July 2007. Costco took the position that at that point, the employment contract had become frustrated and they pointed to written evidence from the employee’s doctor that said that the return to work date could not be predicted at that time.

**Ratio:** This case sets out some of the key principles in frustration and talks about the relevance of a long-term benefit plan. Court delt with the burden of proof by stating that the onus is on the employer to establish frustration of contract. The test for this is; “Whether or not the illness or incapacity was of such a nature or likely to continue for such a period of time that either the employee would never be able to perform the duties contemplated by the original employment contract or that it would be unreasonable for the employer to wait any longer for the employee to recover.” Some of the factors to consider are the presence of long-term sick leave and disability benefits, if the employee’s job is one of many in the same category rather than a key position that must be filled on a permanent basis and the disability itself, the greater the degree of the illness and the longer the absence, the more likely courts will find the employment contract to be frustrated.

**Held:** Court concluded that the employer had not provided sufficient evidence that there was no reasonable likelihood that the employee would not be able to return to work in the reasonable, foreseeable future.

**Reasons:** Although the comments from the employee’s doctor did not provide a prediction for return to work, they also indicated the employee was still receiving treatment, he was still under medication and that he was in the process of seeking further psychiatric treatment. The judge noted that Costco failed to follow up with the doctor to further investigate the likelihood of the employee returning to work. The court said that the availability of the long-term sick leave and disability benefits implied the longer toleration for the employee’s absence due to sickness. Even though the sickness had been going on for a long time, the contract of employment, by providing for long-term benefits, contemplated the possibility that an employee may be absent for a long time for medical reasons. The absence here, while lengthy, was just not sufficient proof for frustration of contract. The court also pointed to the position that Naccarato help, he was a vendor clerk. The court said that his continued absence, even without a predictable return to work date, was not going to harm or disrupt Costco’s business at all. There was no real harm to the employer at all by continuing his status of employment.

#### Duty to Accommodate in Frustration Cases

* Under HR legislation, an employer cannot simply dismiss an employee for absenteeism related to disability. The employer must first establish that it is not possible to accommodate the employee’s disability without the employer incurring undue hardship.
  + The accommodation may require that the employer modify the employee’s job or even move the employee into another position

### Antonacci and Great Atlantic and Pacific (1998)

**Ratio:** Justice Swinton said frustration could not be established unless the employer had discharged its duty to accommodate under HR legislation.

**Note:** However, this decision has not ben consistently followed by later courts. It might be something the SCC may deal with at some point because while there are some cases that have incorporated HR duties in the frustration analysis, other courts have not. However, the *Charter* has been applied directly to the *ESA*’s approach to frustration. It used to be the case that the *ESA* in Ontario provided that frustration for reason of disability was an exception to the employer’s obligation to provide termination and severance pay and this exception was challenged under the *Charter* and it was stuck down for violating s. 15 for discriminating on the basis of disability. So, there is no longer an exception in Ontario for termination and severance pay where the contract comes to an end by frustration for reasons of disability (*Ontario Nurses’ Association v Mount Sinai Hospital* (2005 ONCA)

## Termination of Employment

* The breach of contract that gives rise to a wrongful dismissal claim is the employer’s failure to provide sufficient notice of the dismissal (it is not the fact of the dismissal that makes it wrongful, it is the lack of notice)
* Therefore, the first step is to quantify the amount of notice that the employee is entitled. The start point for this is the contract of employment. If it is an indefinite term of employment, as opposed to a fixed term contract, we look at the contract to see if the parties have rebutted the common law implied term of reasonable notice. If they have not, we use the *Bardal* factors to assess the amount of reasonable notice. If it is a fixed term contract, we look at what the parties have agreed to themselves in the contract with respect to notice of termination and if they have not addressed it, or what they agreed to is not enforceable, then the default will be that the employee is entitled to eb paid for the balance of the term of the contract
* In assessing damages, we are asking what are the employee’s losses as a result of the employer’s breach of contract (failure to provide sufficient notice in accordance with the express or implied terms of the contract)
* The measure of damages for breach of contract is what is required to put the plaintiff in the position they would have been in had the contract been performed (if the employer had given sufficient notice). We are trying to determine what money and other employment benefits the employee would have earned had they worked during the notice period.
* Specific performance is **not available as a remedy for wrongful dismissal at common law**. Specific performance would be an order that the employer rehire the employee for the period of notice. Specific performance is an equity-based remedy, and it is sometimes awarded in breach of contract cases in lieu of damages usually when an award of monetary damages would be inadequate.

## Compensatory Damages

* These are your ordinary damages for breach of contract. The measure of contract damages is the reasonable expectations of the parties. What would it take to put the parties in the position they would have been in had their reasonable terms of their bargain been fulfilled.
* The first thing we need to determine is the appropriate amount of notice. The place to look for this is the contract of employment. If the common law implied term of reasonable notice ahs not been successfully rebutted, then the employee will be entitled to reasonable notice at common law which means that we apply the *Bardal* factors to determine the likely notice period.
* Once we have the notice period, we can start to calculate what the employee would have earned during that notice period. This includes wages, salary, other benefits the employee would have earned during the notice period.
* Damages for wrongful dismissal are calculated from the date on which the employer breaches the contract. This is the day on which the employer dismisses the employee without notice. If the employer has constructively dismissed the employee, damages will be calculated from the date the employer made the unilateral and substantial term to the contract of employment.
* The heads of compensatory damages are:
  + Salary and commission
  + Benefits/Perks
  + Company vehicle
  + Insurance
  + Stock options
  + Bonus

#### Salary and Commission

* Usually wages and salary are easy to calculate. A court might engage in some averaging where the salary or the hourly rate of the work are not consistent to come up with what, on the balance of probabilities, the employee likely would have earned in terms of their wages or salary during the notice period.
* The court will also consider whether the employee would have been entitled to a raise during that period and makes sure they are compensated for that loss of opportunity. The same goes for overtime. If it can be established that it is more likely than not that the employee would have worked and been compensated for overtime during the notice period, then they would be able to include that in the calculation for the notice period.
* For commissions, any payment that would have come due during the notice period or that the employee can show, on the balance of probabilities, that they would have earned had they been giving working notice.
* In the case of commissions, the employee is going to want to lead evidence, as would the employer, to assist the court in this assessment. It will help the court to know what commissions had been earned in the past, if there were any trends in the years or trends in the market.

#### Benefits/Perks

* Any benefits that an employee is entitled to (i.e. club memberships, rent free residences, meal expenses, subsidized mortgages, professional fees or employee discounts), the value of these benefits can be calculated by determined the difference between the market value of these benefits and what an employee would have paid for them during the notice period.
* An employee is also entitled to the person use aspects of benefits such as a car allowance or club benefits.
* They are not entitled to include benefits that relate to job performance only (i.e. use of company vehicle provided for business purposes only) in the calculation of wrongful dismissal damages

#### Company Vehicle

* The employer is not required to compensate an employee for the use of a company vehicle if it was provided to the employee exclusively for company purposes.
* However, if an employee has use of a company vehicle for personal, as well as work purposes, or if a vehicle was agreed upon by the parties to form part of the employee’s compensation, then the employer must compensate the employee for the loss of its sue during the notice period.

#### Insurance Benefits

* These can be life insurance disability insurance, medical drug and dental plans
* Employers have to continue coverage for insured benefits during the reasonable notice period if that is possible. If not, they have to compensate the employee for the loss of those benefits
* In some cases, disability insurers will require that employees be actively employed with the employer in order to enjoy coverage under the group plan with the insurance company. They are required to continue the coverage during the period of employment standards notice, but there is no obligation for an insurance company to make insurance available to an employee who is not actively employed beyond that *ESA* period of notice
* If an employee is no longer actively employed during the reasonable notice period, an employer can reimburse the employee for the cost of obtaining their own coverage during the remainder of the notice period and an employer really should take time to anticipate this because it can be a significant amount of money.

### Canac Kitchens

**Facts:** The employee was diagnosed and treated for cancer after the end of the statutory notice period, when the benefit coverage had been maintained. He had his diagnosis and treatment after this statutory notice period but during the remainder of the reasonable notice period.

**Held:** In a wrongful dismissal action, the employer was ordered to pay over $200,000 for the short term disability and long term disability benefits that the employee would have received had the benefit coverage been maintained throughout the common law reasonable notice period. Court found that he was entitled to 22 months of reasonable notice and it was during this time, once the 8 week statutory notice period was up and he was into the balance for the 22 months reasonable notice period.

**Reasons:** Even though the insurance company would have terminated the employee’s coverage upon completion of his employment followed by the 8 weeks statutory notice period and would not continue it beyond that into the remainder of the 22 months reasonable notice period, it fell to the employer to compensate the employee for that loss of benefits.

#### Stock Options

* An employee who is dismissed without cause may continue to accrue and exercise stock options until the end of the reasonable notice period unless the employment contract or the stock option plan unequivocally states otherwise

#### Bonuses

* Important to distinguish between discretionary and non-discretionary bonuses because it will fall on the employee, as the plaintiff, to show that the damages they are claiming on the BoP reflect losses that they would have experienced during the notice period
  + If it is an entirely discretionary bonus, that is going to make it more difficult for the employee to establish that she would have been awarded the bonus especially if this was during the notice period when the parties know the relationship is coming to an end
* At a minimum, Courts will recognize a requirement that an employer have exercised the discretion in good faith. It will not accept the employer’s argument that it would not have given the bonus solely on the grounds that the employee was leaving
* If the employer can establish that there was likely deficiencies with their performance and that was the criteria on which a bonus had been awarded or denied in the past, the employer is going to be more likely to be successful to defeat the claim for damages for the discretionary bonus

### Pacquette v TeraGo Networks Inc, (2016, ONCA)

**Facts:** P had been wrongfully dismissed and was awarded 17 months reasonable notice at trial. But, the trial judge, in assessing damages did not compensate P for a lost bonus payment during the notice period. The bonus provision in the contract required the employee to be “actively employed on the date of the bonus payout in order to be entitled to the bonus”. The TJ concluded that while P was notionally an employee during the reasonable notice period, he was not “actively employed” at that time and so, as per the terms of the contract he was not entitled to the bonus during the notice period when he was not actively employed.

**Held:** Disagreed with the trial court and found for P on the issue of the entitlement to the bonus.

**Reasons:** The requirement in the contract of active employment did not exclude compensation for bonuses to which the employee would have been entitled to during a reasonable notice period and the CA said that the basic principle in awarding damages for wrongful dismissal is that the dismissed employee is entitled to compensation for all losses arising from the employer’s breach of failing to provide notice. CA said that instead of focusing on whether or not the dismissed employee was “actively employed” within the meaning of the bonus plan during the notice period, they said the key issue was what compensation P would have been entitled to BUT FOR the wrongful dismissal. Had he received reasonable notice of 17 months, he would have been actively employed when the company’s bonuses were paid and that is how we should look at it. Motion judge erred by looking at the bonus provision on it’s own instead of the in the context of the damages inquiry which is aimed at compensating the employee during the notice period. Only if the bonus plans wording unambiguously altered or removed the employee’s contractual rights, should it be said that the employee was not entitled to be compensated for the loss.

**Ratio:** Court set out a 2- part test. (1) Was the bonus an integral part of the employee’s compensation package, thereby triggering a common law entitlement to damages in lieu of the bonus? (2) If so, is there any language in the bonus plan that would restrict the employee’s common law entitlement to damages in lieu of a bonus over the reasonable notice period?

**Ratio:** If an employer wants to make it so that a dismissed employee is not entitled to bonus payment or compensation for loss of a bonus payment during the notice period, the employer will need to point to clear, explicit language in the contract that takes away this entitlement during the notice period. Merely requiring active employment for the entitlement is not enough.

### Matthews v Ocean Nutrition (2020, SCC)

**Facts:** Matthews was a senior level executive with Ocean Nutrition for 14 years and as part of his compensation package, he participated in the company’s Long Term Incentive Plan that rewarded employees for their past and ongoing contributions to the company. Under the plan, a sale of the business triggered a “Realization Event” and that would entitle qualifying employees to a bonus. In 2007, the company hired a new Chief Operating Officer and he had begun reducing Matthew’s responsibilities within the company and by June 2011, Matthews resigned and he later claimed he was constructively dismissed. About 13 months after his resignation/ constructive dismissal, the company was sole and so triggered this “Realization Event” under the company’s Long Term Incentive Plan.

**Relevant terms of the Contract:**

* **2.03 CONDITIONS PRECEDENT:**
  + ONC shall have no obligation under this Agreement to the Employee unless on the date of a Realization event the Employee is a full-time employee of ONC. For greater certainty, this Agreement shall be of no force and effect if the employee ceases to be an employee of ONC, regardless of whether the Employee resigns or is terminated, with or without cause.
* **2.05 GENERAL:**
  + The Long Term Value Creation Bonus Plan does not have any current or future value other than on the date of a Realization Event and shall not be calculated as part of the Employee’s compensation for any purpose, including in connection with the Employee’s resignation or in any severance calculation.

**Issue:** Was Matthews entitled to this bonus payment triggered by a Realization Event that occurred following his resignation which was found to be a constructive dismissal and in the notice period?

**Company’s Position:** Since Matthews was not actively employed on date of the Realization Event, he was not entitled to the bonus payments.

**Prior Proceedings:** At trial, the judge held that Matthews had been constructively dismissed and awarded him a notice period of 15 months. The judge held that Matthews would have been a full-time employee entitled to the bonus payment when the Realization event occurred had he not been constructively dismissed. The trial judge awarded Matthews payments for what he would have been entitled to under the Plan. The CA upheld the decision that Matthews had been constructively dismissed and they affirmed the 15 months’ notice period but they reversed the TJ’s decision on the entitlement to a bonus.

**Held:** SCC overturned the CA decision and restored the decision of the TJ on the question of Matthew’s entitlement to the bonus payment. The court awarded Matthew’s his full bonus which was valued at over $1 million.

**Reasons:**  Employees have a common law right to their bonuses during the notice period. The SCC endorsed the two part test articulated in *Paquette* to determine whether an employee should be entitled to damages for unpaid bonuses. SCC emphasized the high standards to which contractual clauses that purports to limit an employee’s entitlements will be held. Any contractual provision that purports to limit an employee’s common law rights should be brought to the attention of the employee and it must comply with *ESA* minimums. A court will scrutinize these kinds of clauses closely for enforceability and clarity in the language. The court said that Matthews would have been eligible for a bonus had he continued to work for the employer during the notice period. Therefore, since the Realization Event occurred during the notice period, Matthews was entitled to his bonus or now, compensation for the loss of the bonus. The Plan in this case did not unambiguously limit or restrict Matthew’s common law right to his bonus during the common law notice period. The Court found that in the absence of clear language taking away this entitlement to the bonus, the employee was presumed to be entitled to it. The SCC said that to be unambiguous the contract must clearly cover the exact circumstances that haver arisen. Employers cannot count on a generous interpretation by the court, it really needs to be clearly worded and clearly applied to the exact circumstances in the case.

**Ratio:** To limit an employee’s common law entitlement to a bonus during a notice period, employers are required to use unambiguous language in the contract or in the Bonus Plan. In this case, the SCC confirmed that employees have a common law right to everything they would have received had they worked during the notice period. This includes bonuses where the employee entitlement to the bonus is triggered during the notice period. To limit this right of the employee during the notice period, employers will have to use clear, unambiguous language in their employment contracts.

## Bad Faith, Mental Distress and Punitive Damages

* Also referred to as aggravative damages. Refers to damages for emotional pain and suffering that flow from a result of a harsh, insensitive, callous, dishonest or bad faith dismissal by the employer or something about the manner in which the employer carried out the dismissal may give rise to for aggravative damages
* Punitive damages go beyond compensation and instead are aimed at denunciation and punishment of the employer where the employer has engaged in conduct that the court thinks should be punished. This is conduct that could be described as reprehensible or outrageous.
* The law is evolving in the area of aggravated damages
* For a long time, the view of the contract of employment was that the hurt feelings and emotional upset are not compensable. Compensation for emotional distress that flows from dismissal is seen as exceptional and the bar for recovery has been set quite high

### Wallace v United Grain Growers (1996)

**Facts:** Wallace was 45 years old when he started to work with the defendant. The defendant had actually approached him and enticed him to leave his employment. Wallace was securely employed elsewhere and the employer enticed him and lured him away to come and join Untied Grain Growers. Wallace was initially reluctant to do this and in particular, he was concerned about fair treatment and his remuneration. Wallace specifically asked the employer about this and the employer gave him assurances that he would continue to be well paid and that he would be treated well as an employee. They told him that if he performed well, he could expect to be employed until retirement with them. Based on these assurances, Wallace commenced employment with the defendant in 1972 and he had great success at the company. He was a top salesman for each of the years he spent there. However, in 1986, 14 years after joining the company, his employment was terminated without notice and he was given no explanation for the dismissal. Just days before the dismissal, his supervisors and the general manager had complimented him on his work. One week after the dismissal, Wallace received a letter stating that the main reason for his dismissal was his inability to perform his duties satisfactorily. At the time of his dismissal, Wallace was also 59 years old and had been employed by the company for 14 years and the termination of his employment and the allegations of cause created emotional difficulties for Wallace for which he sought psychiatric treatment. His attempts to find similar employment were largely unsuccessful and he was in poor financial state and had declared personal bankruptcy. Wallace sued for wrongful dismissal and in the Statement of Defence the employer alleged Wallace had been dismissed for cause and they maintained this defence for over 2 years. It was only withdrawn at the very last minute, the day the trial was set to begin when they finally admitted that they did not have a defence of just cause.

**Held:** The court increased Wallace’s reasonable notice award from 12 months (which was reached using the *Bardal* factors) to 24 months.

**Reasons:** Court noted the special nature of employment and said the law has to be mindful of the vulnerability of terminated employees. This employer had behaved very poorly and Mr. Wallace suffered as a result. Court was thinking about both aggravated damages (to compensate Wallace for his suffering) as well as punitive damages (to punish the employer) but to do this, as the law was at the time, it was necessary to first find an independent actionable wrong. You needed to have some other independent wrong that the employer had committed. This would serve as the hook on which to hang these damages because these damages were parasitic in nature; you cannot just sue for aggravated damages or punitive damages, they attach to common law actions in tort or contracts. Once the breach is established, compensatory damages flow and in exceptional cases, these extended damages may be awarded. Court was dissuaded from going the route of aggravated and punitive damages because they cannot find an independent actionable wrong. An independent actionable wrong could be (1) a tort, (2) a breach of a contractual provision, one that is independent of the contractual obligation to provide notice or (3) breach of an appliable statute. Court finds that none of these were made out in this case and therefore could not find any independent actionable wrong in this case that could be the hook on which to hang aggravated and punitive damages. Employee counsel argued that the court should recognize a new type of tort independent actionable wrong known as “bad faith discharge”. But, there was not much of an argument made in support of the judicial recognition of the new tort. Employee counsel argued that it was employer conduct that should be discouraged and that it imposes harms and losses that should be compensated but there was not more to the argument than this. Another possible independent actionable harm is the breach of an independent contractual term and it could be argued in this case. It could be argued that there is an implied term of good faith in the contract and that the employer breached that term. The Court does not use the opportunity to recognize such an implied term. In fact, he says that while the legal recognition of the term would be a good idea, it would be too intrusive for the court to read it in and it would be better left for the legislature to do. However, even though the court could not find an independent actionable wrong, instead of using aggravated and punitive damages, the Court said that in cases like this where you have an employer that has conducted a dismissal in a manner that is particularly harsh or callous or unfair to the employee, the court may respond by adding to the period of reasonable notice that is used in quantifying damages. After figuring out reasonable notice on the *Bardal* factors, the court could then increase the number of months to reflect the manner of dismissal. This is what the Court did in this case. In doing this, the court talked about there being an employer obligation to act in good faith in the manner of dismissal. Breach of this obligation will be compensated through the addition to the notice period. This has come to be known as *Wallace*  damages.

* While an independent actionable wrong is needed for punitive damages now, it is not clear that it is required for aggravated damages

**Ratio:** Court created *Wallace* damages where they would increase the amount of reasonable notice an employee is entitled to if there was particularly egregious conduct by the employer.

**Problems with the *Wallace* Damages Approach**

* It is not clear what the *Wallace* bump up was supposed to it. Was it meant to purely compensate? Or is it punitive in nature instead or as well?
* There was no formula or measure for calculating the bump up.
* There is a difference between aggravated and punitive damages on the one hand and reasonable notice damages on the other. Reasonable notice damages are subject to mitigations which means that whatever the employee earns in mitigation will be deducted from the reasonable notice damages. If the employee has the good luck of finding another job before the reasonable notice period is up, then they don’t get the balance of their reasonable notice damages assuming the same level of compensation in the new job as in the old job. In this case, this could mean that if Wallace found a job at or before the 12 month mark at the same rate of pay he would not see a penny of the bump up because he would mitigate away those losses in the second half of his notice period and therefore, the portion of the award that was meant to compensate and/or punish the employer would be mitigated away. In some cases after *Wallace*, courts began to notice this and some courts held that *Wallace* damages should not be subject to mitigation but this was not a rule that was universally recognized or applied by the courts.
* *Wallace* damages were also problematic because it meant that in practice, nearly every wrongful dismissal claim would be a claim for *Wallace* damages because getting fired always sucks and often leads to emotional suffering. Employers are often insensitive and unkind. With all the uncertainty surrounding these damages the question often arose of how much a court should award. It made it hard for employees and employers to negotiate settlements outside of court. It encouraged settlements, especially for employers because of the fear of the uncertainty. They would not be able to confidently predict their potential liability for *Wallace* damages and for this reason, they may be inclined to give a generous settlement for the expense and uncertainty of litigation.

### Honda Canada Inc v Keays (2008, SCC)

**Facts:** Keays was an employee at Honda and was diagnosed with chronic fatigue syndrome. Honda had a disability program that was a plan for dealing with employees with disabilities to help with absences, return to work and accommodations. The program permitted Keays to miss work so long as he provided a doctor’s note confirming that his absences were really related to his disability. But, after a while, Honda started to get frustrated with Keays as it seemed like he was absent more frequently and it seemed like his doctor’s notes were more and more cryptic. The employer started to be suspicious and question whether Keays suffered from the disability that he claimed and whether it justified this growing number of absences. The employer asked Keays to submit to an independent medical assessment, a meeting with the doctor that the company approved of. Keays refused and said he would not meet with a doctor without more information about the purpose of the meeting. Keays was not satisfied with the lack of information and refused to meet with the doctor. The employer ordered him to meet with the doctor and essentially said “meet with the doctor or you are fired”. The employer took the position that the refusal to follow the order amounted to insubordination and was just cause for dismissal. The employer gave Keays an ultimatum and said “meet with the doctor or don’t come back to work” and Keays did not come back to work. The employer dismissed him without notice in response. Keays sued Honda for wrongful dismissal.

**Prior Proceedings:** ONSC found that Keays had been wrongfully dismissed because there was no cause for dismissal. They awarded him 15 months’ reasonable notice (*Bardal* factor analysis) and an additional 9 months for the *Wallace* bump up on the basis of Honda’s harsh conduct leading up to the dismissal. The ONSC also gave him an unprecedented $500,000 in punitive damages which was the largest in Canadian employment law history for Honda’s high handed and outrageous behaviour. In support of this punitive damages award, the ONSC pointed to breach of the HR Code, the employer’s failure to accommodate Keays’ disability (this was the independent actionable wrong that grounded the claim for punitive damages). This decision was appealed and the ONCA reduced the punitive damages from $500,000 to $100,00 but they left the rest of the damages intact. This was then appealed to SCC.

**Held:** SCC agreed that there was no cause for dismissal. They found that the refusal to see the employer’s doctor was not cause for dismissal and they accepted the TJ’s award of 15 months reasonable notice on the *Bardal* factors. Then they went on to consider the *Wallace* bump up (the 9 month’s). Keays wound up with just the 15months notice award. They took away the 9 month’s *Wallace* bump up as well as the punitive damages.

**Ratio:** The SCC said that while damages are recoverable for a bad faith conduct in the manner of dismissal, those damages should not take the form of an addition to the notice period. Instead, the general rule of contract damages will apply. This is the rule from *Hadley v Baxendale* which is the case that says contract damages are recoverable if they were within the reasonable contemplation of the parties at the time the contract was formed. Replaced the *Wallace* approach with the general rule of contract damages that losses can be compensable if they are reasonable within the contemplation of the parties at the time of contract formation.

**Reasons:** “There is only one rule by which compensatory damages for breach of contract should be assessed: the rule in *Hadley v Baxendale*. The *Hadley* test unites all forms of contractual damages under a single principle…. Thus if the employee can provide that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damage.”

* This is a difficult standard to work with. How can it be shown that the parties, at the time of contract formation, had a bad faith dismissal and the harms and losses it would cause within their contemplation. Rarely, if ever, will there be evidence of this and so it is just going to turn on what the courts think is reasonable to say that these parties reasonably contemplated for losses flowing from a bad faith dismissal at the time they formed the contract
* In this passage, the SCC killed the *Wallace* approach of the arbitrary extension to the notice period.
* The court said that is because of *Wallace* that this kind of loss is reasonably foreseeable. At least since *Wallace,* there has been an expectation by both parties that employers will act in good faith in the manner of dismissal and a recognition that failure to do so can lead to compensable damages.
* SCC said that Honda had not acted in bad faith in the manner of dismissal. There was nothing malicious or unduly sensitive in the manner in which the employer had handled the dismissal. Therefore, Keays was not entitled to aggravated damages or moral damages, nor was he entitled to punitive damages.
* On the punitive damages point, the SCC said that there was not an independent actionable wrong which is required for punitive damages. Keays counsel had argued that Honda had breached the HR code by failing to accommodate his disability which gave Keays an independent actionable wrong. SCC said that even if the conduct was sufficiently vindictive and reprehensible as to warrant punitive damages, there was not an independent actionable wrong on the basis of HR legislation because breach of HR legislation cannot be an independent actionable wrong because of the court’s earlier decision in *Bhadauria v Seneca College.* This was the case where the SCC declined to recognize a cause of action based on violations of HR legislation or on a novel tort of discrimination saying that the existence of HR legislation and HR tribunals left common law courts without the jurisdiction to decide HR matters. SCC says that breach of HR legislation cannot serve as an independent actionable wrong for punitive damages.
* Employees not only have to show proof of the losses they suffered but they also have to show that it was reasonably within the contemplation at the time of contract formation that those harms and losses could flow from a bad faith dismissal. One of the benefits for an employee who can establish this link and can provide evidence of the harms they have suffered is that *Keays* damages actually compensate for the harms rather than an arbitrary addition to the notice period, the court can fashion a damage award that reflects the extent of the employee’s actual losses. This clearly shows that these damages are designed more to be compensatory whereas with *Wallace*, it was not clear whether the damages were meant to be compensatory or punitive.
* Also worth noting the change in terminology. While the court says there is no difference between aggravated damages and moral damages where aggravated damages compensate for ordinary emotional distress that results from contract and moral damages which compensate from the emotional distress that results from the breach of contract, the language of moral damages has now been introduced into he wrongful dismissal context.

**Note:** As a consequence of *Wallace and Keays,* an employee can recover moral or bad faith damages if the court finds that the manner of dismissal caused the employee real physical or psychological harm. The link that needs to be drawn is between the manner of dismissal and the harm. It is not the fact of dismissal itself; it is the consequences for the manner of dismissal that the damages are being awarded. The employee is going to have to establish theses losses on a balance of probabilities and lead evidence to establish these losses.

### Calistro (ONCA)

**Held:** $100,000 awarded for the mental suffering experienced by the female employee who had been constructively dismissed when the employer rehired a man who had years earlier sexually harassed her.

**Significance:** This is one post-*Keays* case dealing with these damages.

### Pate Estate v Galway-Cavendish & Harvey Township (2013, ONCA)

**Facts:** Pate was the Chief Building Inspector for the Townships. He was confronted by the employer with an alleged building fee discrepancy and was told that if he resigned immediately the matter would not be reported to the police. He was not given any particulars or given an opportunity to respond to the allegations or explain the discrepancy. He refused to resign and his employment was terminated by the Township. Criminal charged were laid and after a 4-day trial, Pate was acquitted of those criminal charges. Pate sued the township for wrongful dismissal and malicious prosecution.

**Prior Proceedings:** The trial judge ordered $550,000 in punitive damages on the basis that the employer had engaged in “significant misconduct. They had spearheaded criminal proceedings against the employee over a period of more than 10 years. The judge determined that the employer had acted intentionally and that it had a devastating impact on the employee including his prospects for finding alterative employment, as well as on his marriage and personal life. At trial it came out that certain pieces of exculpatory information had been withheld from the police and the responsible officer would not have proceeded with the charges if he had been aware of that information that he employer withheld. The trial judge dismissed the malicious prosecution action but it did award damages for reasonable notice in the amount of 12 months and $25,000 in punitive damages. The judge indicated that he would have ordered more but he was bound by the principles of proportionality. On appeal, the court ordered a new trial on the issue of punitive damages and malicious prosecution. After two separate retrials, the trial judge found the Township guilty of malicious prosecution and increased the punitive damages to $550,000. Township appealed.

**Held:** Reduced the punitive damage award to $450,000. Pate had passed away just before the appeal. His estate was awarded the reasonable notice damages and the punitive damages in the amount of $450,000.

### Boucher v Wal-Mart (2014, ONCA)

**Facts:** Boucher was an assistant manager at Walmart. At some point, her manager asked her to falsify a report, a temperature log and she refused. That began a 6 month long period of verbal harassment and intimidation directed at Boucher. Boucher complained to upper management but that seemed to only increase the intensity of the harassment she suffered at the hands of her manager. Her manager would swear at her, he called her stupid in front of colleagues and he was really trying to get Boucher to quit. He admitted this when am HR manager told the manager to back off he replied “not until she fucking quits”. Walmart undertook an investigation into Boucher’s complaints but they concluded that her complaints were unsubstantiated and that she was just trying to undermine her supervisor and that she needed to stop. Boucher quit and sued for constructive dismissal. She suffered physical symptoms of emotional distress that were diagnosed by a doctor as being linked to stress. Walmart continued to pay her salary and benefits for 8 months even though her contract entitled her to just 20 weeks notice of termination.

**Prior Proceedings:** Boucher was successful in her wrongful dismissal claim and a jury awarded her punitive damages against the manager in the amount of $150,00 as well as another $150,000 for damages for the tort of intention infliction of emotional distress. Jury also awarded $200,000 against Walmart plus an additional $1 million in punitive damages against Walmart. Both the awarded made against the manager and against Walmart were appealed.

**Issue:** Did the jury err in awarding such sizeable aggravated and punitive damages against the manager and Walmart.

**Held:** CA upheld tort award against manager but reduced punitive damages against him from $100,000 to just $10,000. CA upheld aggravated damages award of $200,000 against Walmart. CA reduced punitive damages against the employer from $1 million to $100,000.

**Reasons:**

* In reducing the punitive damages against the manager, the court said that his behaviour was a marked departure from the ordinary standards of decent human behaviour and therefore it warranted punitive damages but when combined with the tort award of $150,000 the jury’s punitive damage award was excessive. Punitive damages are meant to punish and deter and it was not necessary toa ward $100,00 on top of the tort damages and that those tort damages would be able to achieve the goals of punishment and deterrence with respect to the manager.
* The court found bad faith in the manner of dismissal to justify upholding the $200,000 award. Walmart did not take her complaints seriously, they took the manager’s side and told Boucher to stop trying to undermine him and they threatened her with discipline if she did not stop.
* In reducing the punitive damages against Walmart, the court found that there was an independent actionable wrong by breaching the implied duty of good faith and fair dealing in employment contracts which, since the time of *Wallace*, had become more well established in employment law. CA said that $1 million in punitive damages was unnecessarily high and not rationally connected to the objective of deterrence and denunciation given that Walmart was already liable to pay $200,000 in aggravated damages plus they would be vicariously liable for the damages awarded against he manager. On this basis, they reduced the punitive damage award

**Ratio:** CA also gave some guidance on how to award punitive damages in a case like this. The court said:

* “In order to obtain a punitive damages award, an employee must establish that:
  + 1. The employer’s conduct is reprehensible, meaning that it is “malicious, oppressive and high-handed” and that it reflects “a marked departure from ordinary standards of decent behaviour”;
  + 2. Notwithstanding any other compensatory award (e.g. wrongful dismissal damages), punitive damages award is “rationally required to punish [employer] and to meet the objectives of retribution, deterrence and denunciation”; and
    - On this basis, it may be unnecessary to award punitive damages if the compensatory award is sufficient to denounce and deter the bad conduct or it may result in a deduction as it did in this case
  + 3. There is an “independent actionable wrong” that was committed by the employer aside form the wrongful dismissal itself (e.g. breach of duty of good faith and fair dealing, intentional infliction of mental distress, etc.)

### Galea v Wal-Mart (2017, ONSC)

**Facts:** Galea was hired as a District Manager in training at Walmart in 2002. Over the course of her employment, she received numerous promotions and was considered a very valuable employee. Throughout her time, she was consistently praised and rewarded and she was being groomed for higher leadership. In 2008 she was promoted to VP General Merchandise. But in 2010 she was informed that that position was being removed as a result of restructuring and Walmart told her that she was still a valuable employee and they would find her another position. However, Walmart did not do this. At one point, Walmart announced in front of 500-600 people that Galea would be working as SVP Merchandising Strategic Initiatives which was a demotion from her previous position. This new position did not actually materialize, nor was she assigned any responsibilities or any further roles within the company. She was just put in an *ad hoc* position with no defined duties and she was effectively “red circled” meaning they had flagged her as not being eligible for any promotions. But, all this time there were assurance being made to her that she was a valuable employee with a future with the company. Then, when Galea returned from an 8 week course at Harvard related to work in the fall of 2010, she came back to discover that her personal effects had been packed up and moved to a different office and that her work phone had been disconnected. Her employment was soon after that terminated. Walmart paid her salary for 11.5 months following her termination but she still brought an action for wrongful dismissal and she also claimed aggravated and punitive damages.

**Held:** The court awarded her aggravated damages of $250,000 and punitive damages of $500,000, totaling $750,000. This is one of, if not the, highest award in an employment law case in Canada.

**Reasons:** The court said that Walmart had breached its implied duty of good faith to Galea, causing her serious mental distress. In the course of litigation the court also found that Walmart either purposely or indefinitely delayed matters throughout litigation which caused her additional emotional distress beyond that related to the termination itself. The court found that Walmart’s conduct was misleading at best and dishonest at worst in the way it treated Galea. The court also found that Walmart’s treatment of Galea was callous, high handed and reprehensible. Court summed up the behaviour by saying “it is not that Walmart set up Galea to fail, it is that Walmart built her up only to let her down much more. That corporate behaviour was not just duly insensitive, it was mean.” Court awarded a higher amount of punitive damages to deter Walmart from behaving in a similar way in the future.

### Bailey v Service Corporation (2018, BCSC)

**Facts:** Employee was terminated by the employer while on sick leave. The employee actually found out about the termination when his wife was told by the insurance company. The employer then falsely maintained that it had just cause for dismissal.

**Held:** Employee was awarded $110,000 in punitive damages when the employer terminated him while on sick leave.

### Ruston v Keddco Mfg (2019, ONCA)

**Facts:** Ruston was hired as a sales rep in 2004 and quickly moved up the ranks. Keddco was acquired by another company in 2011 and Ruston was named President of Keddco. However, he was terminated in 2015, after 11 years. He was informed that the dismissal was for cause and the company said that it was for fraud but they never gave any details of the alleged misconduct. Employer just threatened that if Ruston sued for wrongful dismissal that it would counter claim and that it would be very expensive for him. Ruston was not discouraged and did sue for wrongful dismissal and the employer, just as it had threatened, counter claimed claiming damages of $1.7 million and $50,000 in punitive damages claim.

**Prior Proceedings:** TJ upheld wrongful dismissal claim and dismissed the employer’s outrageous counter claim. Ruston was awarded damages for 19 months reasonable notice and he was given $100,00 in punitive damages and $25,000 in aggravated damages. Keddco appealed.

**Held:** CA dismissed Keddco’s appeal. Upheld TJ’s decision to award both punitive and aggravated damages on the same conduct.

**Reasons:** The reasonable notice damages of 19 months was justified based on the 11 years of service, the age of the employee (he was 54), the level of his education (just grade 12) which would have a bearing on his prospects for alternative employment and the serious nature of the allegations made against him. The court said that the punitive damages award should be upheld o the basis that the employer’s conduct was bad, it was deliberately deceitful and was purely an intimidation tactic. The court also held up the aggravated damages on the basis that the employer’s conduct was designed to cause stress and it did in fact result in mental distress to the employee.

* Employer argued that the TJ’s decision to order both punitive and aggravated damages on the same conduct was an error and that you should not be able to get both aggravative and punitive damages based on the same conduct. CA dismissed this argument and said that the two awards do not amount to double recovery or double punishment because aggravated damages are aimed to compensate a plaintiff for the damages caused by the manner of the breach while the punitive damages seek to punish and denunciate inappropriate or unfair conduct.

**Significance:** This case shows that while a court should consider the combined effect of compensatory damages and punitive damages, in coming up with an amount for punitive damages that is sufficient but not excessive, it is not double recovery for an employee to get both. The two kinds of damages still have two very distinct purposes.

## Mitigation of Damages

* This is the employee’s duty to take reasonable steps to mitigate the losses flowing from the wrongful dismissal. This will typically mean taking steps to find alternative employment.
* While this duty usually applies in wrongful dismissal cases, it is necessary to look at the contract of employment to determine whether there is a duty. We must look at what the parties have agreed to
  + If the contract specifically states how much notice or pay in lieu of notice an employee is entitled to, the employee is under no obligation to mitigate their losses unless the contract contains an express term requiring the employee to do so
    - i.e. If the contract says “the employer shall provide the employee with 3 months notice of termination or pay in lieu of notice” that is the employee’s entitlement and without more (with no mention of a duty to mitigate) the employee is entitled to that. It does not matter if the employee finds a job the next day they get their contractual entitlement from the employer who dismissed them in addition to whatever pay they may get from their new employment
    - the same is true of a fixed term contract (*Howard v Benson Group)*. Where the employer terminates a fixed term contract before the end of the term, the employee is entitled to the pay they would have earned for the balance of the term and there is no duty to mitigate unless the contract expressly says there is.
* Difficulty comes when we are dealing with a dismissal where the employee is owed reasonable notice. This is where the duty to give notice flows from the implied common law duty of reasonable notice. In these cases, assuming the contract does not say otherwise, the employee is now under a duty to mitigate. This means that an employee who is dismissed without reasonable notice but who is claiming they are entitled to reasonable notice, must take reasonable steps to mitigate the damages that they suffer as a result of not receiving reasonable notice
  + Issue of mitigation is largely an exercise in assessing reasonableness of the employee’s actions
* Examples:
  + Support a court finds that an employee who was wrongfully dismissed was entitled to 3 months reasonable notice. The court will look at what happened in the 3 months following the dismissal. If the dismissed employee found another job whatever they earn in that new job will be mitigating their damages in full or in part. So, for example, if they find a job after the 1 month part and it is at the exact same rate of pay, the employee would only be entitled to 1 months reasonable notice from their employer because they would have mitigated away their losses in moths 2 and 3. Or, suppose they find another job right away but it pays slightly less, they would be able to claim just the difference as damages as they would have mitigated away the rest. In these examples, the employer actually benefits from the employees successful mitigation efforts.
  + Employer could also benefit if the employee did nothing at all. Suppose the employee took no steps to find another job after being wrongfully dismissed the court may find that the employee has failed to discharge the duty to mitigate and make a deduction from the damage award to reflect that. The court may do this by speculating about what the employee could have reasonably expected to earn if they actually tried to find a job and deduct that amount from any damages owed by their former employer

#### The Duty to Mitigate

* The burden is on the employer to establish that the employee could have mitigated their losses but failed to do so. This may mean demonstrating that the employee did not take reasonable steps to find another job or that they did not accept a job offer which, if they had accepted, would result in mitigation of damages
* Employers will want to have evidence of job vacancies or job opportunities that were available during the employee’s notice period and that the employee could have applied for.
* Employee is not required to accept any job. The duty is to take reasonable efforts to mitigate their losses
* “The duty to act reasonably… must be a duty to take such steps as a reasonable person in the dismissed employee’s position would take in his own interests – to maintain his income and his position in the industry, trade or profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position and not in relation to that of the employer who has wrongfully dismissed him. The former employer cannot have any right to expect that the former employee will accept lower-paying alternative employment with doubtful prospects.”
  + *Forshaw v Aluminex Extrusions (*1989, BCCA)
  + What counts as reasonable will depend on the facts of the case. In particular, we need to look at the employee’s income, their position with the former employer, their status in the industry in assessing what is reasonable in their job search efforts following the dismissal.
  + This means an employee can reasonable decline job opportunities that would result in a substantial step backwards from their previous job in terms of pay or status
  + An employee is also not expected to apply for jobs they are not qualified for nor would they be expected to accept a part-time rather than a full-time position
* If job opportunities are scarce for the employee, reasonably mitigation might include returning to school or getting some new training in which case they are not earning anything at all in mitigation but it may be a reasonable step in order to put the employee in a position to find secure employment down the road
* Reasonable mitigation may require that the employee relocate if no jobs are available locally. However, courts will be mindful of the employee’s position including their age, personal circumstances, the extent to which they are mobile (i.e. family commitments) in deciding what is a reasonable search
* Opting to start a new business might be found to be reasonable mitigation but not if it is a risky venture and secure alternative employment opportunities were available at the time

#### Continued Employment as Reasonable Mitigation

* What about when the employer who dismissed the employee offers them a new position?
  + An employee may be expected to accept that position or stay in a position with the employer who just dismissed them in order to satisfy the duty to mitigate
* The duty to mitigate requires an employee to accept a job offer from the former employer if a reasonable person in the employees position would have accepted the employers offer (*Evans v Teamsters Union 31)*
* Two conditions that must be met for the court to conclude that a reasonable person would have accepted a job offer from the same employer in satisfaction of the duty to mitigate: - *Evans v Teamsters Union 31* (2008, SCC)
  + 1. The salary offered is the same, the working conditions are not substantially different or the work demeaning, and the personal relationships are not acrimonious;
  + 2. Returning to the old workplace would not place the employee in an “atmosphere of hostility, embarrassment or humiliation”
* One thing an employer can do to try to minimize, or even eliminate entirely, their liability for wrongful dismissal is to offer a dismissed employee a job opportunity during the notice period. By staying on, they would mitigate their losses and if they refuse, as long as it is not the case that the relationships are acrimonious or that it would be embarrassing to return to the employer’s workplace in the position offered, the employee may be found to have failed to discharge the duty to mitigate which can result in a reduction or elimination of their damages for wrongful dismissal.
* If the employee chooses to do this, they should make it clear that they are doing this purely to mitigate their losses. This is especially true in cases of constructive dismissal. If the employee chooses to stay on in the altered position to satisfy the duty to mitigate, the employee should make it known to the employer that those are the conditions on which they are choosing to stay and that staying on is not because the employee accepts or condones the employers unilateral changes because that cold undo a finding of constructive dismissal.

### Brake v PJ M2r Restaurant (2017, ONCA)

**Facts:** Ester Brake was a 20 year employee of PJ M2r Restaurant. Brake managed the employer’s McDonalds franchise in Ottawa and also worked part-time at Sobeys while she was a manager at the McDonalds. After several years of very strong performance, she was placed on a 90 day performance improvement plan and at the end of the plan she was told that she failed the program and she was given the choice of a demotion to Assistant Manager or termination. She refused the demotion. She was terminated and she sued for wrongful dismissal. Following her dismissal, she continued to work at Sobeys but she was not able to find a comparable position to that which she held as Manager at McDonalds. She found a “substantially inferior position” as a cashier at Home Depot.

**Prior Proceedings:** At trial, the judge found that the complaints about Brake’s performance did not amount to just cause for dismissal and so it amount to a wrongful dismissal. The court set the notice period at 20 months and the employer appealed.

**Held:** CA dismissed the appeal and upheld the trial judge’s decision that Brake had been constructively dismissed through the demotion and the majority of the court also upheld the notice period of 20 months.

**Reasons:** “When a wrongfully dismissed employee accepts new employment during the notice period, the question of whether or not to deduct those earnings depends on the trial judge’s assessment of mitigation. If the trial judge finds that the new job is comparable to the old one, the earnings should be deducted as mitigation of damages. If the trial judges finds that the new job is vastly inferior to the old one, such that the employee would not be in breach of the duty to mitigate if she turned it down, the earnings should not be deducted…. In this case, the employee was not an executive who could afford to live during the notice period without a salary. It was in her interest to try to obtain a comparable managerial position but she was not able to do so, and because she could not afford to earn nothing, she had to take the only job she could find. The trial judge determined that the job she found was in no way comparable to her managerial position with the appellant. As a result, it did not have the effect of mitigating the damages she suffered from her wrongful dismissal by the appellant employer and should not be deducted.”

* Majority of the CA found that Brake was not obligated to accept the demotion at McDonalds to mitigate. They followed the criteria from *Evans* and upheld the TJ’s finding that it would have been humiliating for Brake to have accepted the demotion. Therefore it is not something a reasonable person would be accepted to do in mitigation of damages
* Majority agreed with the general principle that an employee may have wrongful dismissal damages reduced by whatever they earn during the notice period. However, they held that none for the earnings in this case should be deducted as it was unclear the income she had during the notice period should offset the employer’s liability. With respect to the Sobeys job, the court characterized that as “supplemental income” and she would have had that income if she continued to work at McDonalds at all and so it should not be deduction from employer’s liability for wrongful dismissal. Court also looked at her earnings from Home Depot, which were quite modest, $600, and the court said this amount should not be deducted from the employer’s liability because the character of employment was “substantially different” so it should not be deducted from the employer’s liability.

**Significance:** This case made it clear the limitations on an employer’s ability to rely on mitigation earnings to reduce its liability. It went through categories of earnings that will not reduce an employer’s liability (i.e. employment insurance income and income during the statutory notice period is not subject to mitigation, the supplemental income and the substantially inferior position she took at Home Depot).

## ~~Human Rights Legislation: Discrimination and Accommodation~~

## ~~The Test for Discrimination and BFOR/Accommodation~~

* ~~Every jurisdiction in Canada has some version of human rights legislation which prohibits discrimination on certain personal characteristics~~
* ~~Here we are looking at workplace rules or standards that an employer has in place which may discrimination against an employee on one of these grounds~~

#### ~~The Two-Step Approach~~

**~~Step One (~~*~~Elk Valley)~~***

* ~~The complainant must establish a~~ *~~prima facie~~* ~~case of discrimination:~~
  + ~~That he or she has a characteristic that is protected by a prohibited ground in the human rights legislation; (such as gender, sexual orientation, race, religion, disability etc.)~~
    - ~~This is the requirement to pigeonhole your case into one of the recognized grounds of discrimination~~
    - ~~Unlike s. 15 of the~~ *~~Charter~~*~~, there is no analogous grounds provision in Canadian HR legislation so you need to identify the precise rounds of discrimination that you are implicating was infringed~~
  + ~~That they have experienced an adverse impact; and~~ 
    - ~~This can be either direct or indirect (the law used to distinguish between these two)~~
    - ~~Direct discrimination is a rule which explicitly draws a distinction based on a prohibited ground (i.e. a rule that says no Sikh’s in the workplace)~~
    - ~~Indirect discrimination was a rule that says, for expel, all forms of headwear are forbidden in the workplace~~
    - ~~It used to be the case that whether it was direct or indirect discrimination would affect the duties that an employer owed and what remedies were available to the employee but in~~ *~~Meiorin~~*~~, the SCC did away with this distinction. It does not matter if the discrimination is direct or indirect anymore.~~
  + ~~That the protected characteristic was at least a factor in the adverse impact (it does not need to be the only factor)~~ 
    - ~~Standard here is on the balance of probabilities so the complainant needs to establish that on the BOP the protected characteristic was at least a factor in the adverse effect they experienced~~
    - ~~The employee does not need to establish exclusively that the characteristic was certain the reason for the differential treatment nor do they have to show that it was the only factor.~~
* ~~The complainant must prove this, and it is on the standard of balance of probabilities~~
* ~~Once a~~ *~~prima facie~~* ~~case of discrimination is made out on the BOP, the burden shifts to the employer to establish that one of the exceptions or defenses in the legislation applies~~

**~~Step Two (~~*~~Meiorin~~*~~)~~**

* ~~This step asks “is that discrimination established by the complainant nevertheless permitted by a statutory defense or an exemption in the relevant HR statute?”~~ 
  + ~~This is where we see if the discrimination is lawful or not~~
* ~~The onus shifts to the employer to establish a~~ *~~bona fide~~* ~~occupational requirement:~~
  1. ~~That the employer adopted the standard for a purpose that is rationally connected to the performance of the job~~
  2. ~~That the employer adopted the standard in an honest and good faith that it was necessary to the fulfillment of that purpose; and~~
  3. ~~That the standard is reasonably necessary to the accomplishment of that legitimate purpose which required the demonstration that it is impossible to accommodate the employee without imposing undue hardship of the employer.~~
* ~~If the employer can show that it is exempt from the prohibition against discrimination or that the differential treatment flows from a~~ *~~bona fide~~* ~~occupational requirement, then the discrimination will not be unlawful~~
* ~~The BFOR defence permits some kinds of discrimination on prohibited grounds when the rule or standard or policy can be show to be a~~ *~~bona fide~~* ~~occupational requirement~~
* ~~All the BFOR test requires employers to do is to make sure that only workplace standards and rules that are rationally connected to a work performance purpose that are introduced in good faith and that are reasonably necessary for the performance of the job.~~

### ~~Elk Valley~~

**~~Facts:~~** ~~The complainant was Stewart, a loader at a coal mine and this was very dangerous work in a very safety sensitive workplace. To help ensure the safety of the workplace, the employer had adopted a policy which required employs to disclose if they had a drug addiction. If they disclosed that they had an addiction, the employer would offer the employee treatment options without negative consequences for their employment. However, if they did not disclose the addiction and they were later in a workplace accident and tested positive for drugs, they would be terminated. This is what happened to Stewart. Stewart did not disclose that he used cocaine on his days off from work. When he was later involved in a workplace accident and tested positive for drugs, he was terminated. Stewart filed a human rights complaint claiming that he was addicted to cocaine and that this constituted a disability and that therefore, there was a~~ *~~prima facie~~* ~~case of discrimination since he was terminated because of his disability or at least it was one factor in the employer’s decision to termination his employment. The employer argued that Stewart was terminated for breaching the drug policy and not because of his disability.~~

**~~Issue:~~** ~~Was there a~~ *~~prima facie~~* ~~case of discrimination? In order to prove this, the employee must show on the BOP that he suffered differential treatment because of a protected characteristic.~~

**~~Held:~~** ~~No, there was not a~~ *~~prima facie~~* ~~case of discrimination.~~

**~~Reasons:~~** ~~SCC applied the three requirements set out above. First, that he had a disability and they found this was satisfied. Second, that he had suffered an adverse impact because of having the disability and the court said this was satisfied as well. It was on the third step that Stewart failed because he had not established on the BOP that the adverse impact (the termination) was related to his disability. He had a disability )drug addiction) and he lost his job because of it (adverse impact) but the third requirement was not satisfied because Stewart was terminated for failing to comply with the employer’s policy requiring him to disclose his addiction and the termination was not because of his disability. SCC said that Stewart had the same opportunities as all other employees to comply with the policy, but he chose not to. SCC considered expert evidence that although denial of an addiction can be a symptom of the addiction, in this case, Stewart still had the capacity to comply with the policy and so his disability (his addiction) was not found to be the reason for his failure to comply with the policy and therefore the termination was not because of his addiction.~~

**~~Note:~~** ~~Employer policies which adversely affect those with addictions can be found to violate the human rights code. For example, if an alcoholic is terminated for reporting to work while intoxicated or for alcohol related absenteeism those kinds of cases may give rise to a~~ *~~prima facie~~* ~~case of discrimination on disability. Where an employee who suffers from a drug addiction is terminated for stealing drugs, a~~ *~~prima facie~~* ~~case of discrimination may be established if the employee can show that the addiction influences the decision to steal. However, this does not mean that an employee can never dismiss a substance-addicted employee for workplace problems. The employer may still have a defence that will justify the dismissal in the circumstances, or the employee may not be able to establish that the termination was linked to the disability as was the case here. A perceived disability falls within the scope of a disability for the purposes of human rights legislation and that means that mandatory random drug and alcohol testing policies will constitute a~~ *~~prima facie~~* ~~case of discrimination if there are adverse impacts associated with failing the test and the employer treats the employee who fails the test as if they are substance addicted. This does not mean that all drug and alcohol testing is prohibited, sometimes it can be justified as a~~ *~~bona fide~~* ~~occupational requirement.~~

### ~~Meiorin~~

**~~Facts:~~** ~~Meiorin was hired as a forest firefighter by the BC government in 1992. She performed very well in the first couple years of her job and then in 1994 the BC government introduced some new fitness standards for firefighters which required all firefighters to take fitness tests. Meiorin passed 3 of the tests but she was unable to pass a 4~~~~th~~~~. The test she could not pass was one that required her to run 2.5km in 11 minutes and she attempted several times and the closest she came was going 49 seconds over. She was terminated for feeling to meet the fitness standard. She filed a grievance. Union decided to bring the grievance on Meiorin’s behalf. The union filed the grievance alleging discrimination on the basis of sex. Previously, two men had challenged the fitness standards the government put in place and the union challenged them, not on the basis of human rights but rather as unfair rules or standards. More specifically, as an improper exercise of management rights under the collective agreement and those grievances brought by men were not successfully. The arbitrator held that under management rights under a collective agreement, the employer had the right to set reasonable rules and standards for the workplace and it was reasonably to impose fitness standards on employees who perform physically demanding work. There was evidence that the fitness standard discriminated against women because women were much less likely to meet the standard. While 65-70% of men passed the test only about 35% of women passed the test.~~

**~~Prior Proceedings:~~** ~~The Arbitrator ruled that the fitness standard discriminated against women and ordered Meiorin to be reinstated to her job. This was applied to the BCCA which overturned it and then that was appealed to the SCC.~~

**~~Issue:~~** ~~Did this fitness standard discriminate against women? If so, could the discrimination be justified as a BFOR?~~

**~~Held:~~** ~~Court ruled that the employer had failed to make out a BFOR. The employer could not rely on the BFOR defence and so the employer’s decision to reinstate her with back pay was upheld.~~

**~~Ratio:~~** ~~Once the complainant has established a~~ *~~prima facie~~* ~~case of discrimination, the onus moves to the employer to establish that the discrimination is justified because the workplace rule or standard at issue is a BFOR. To do this, the employer must show 3 things. 1) That the employer adopted the standard for a purpose that is rationally connected to the performance of the job. 2) That the employer adopted the standard in an honest and good faith belief that it was necessary for the fulfillment of that purpose. 3) That the standard is reasonably necessary to the accompaniment of that legitimate purpose which requires a demonstration that it is impossible to accommodate the employee without imposing undue hardship on the employer.~~

* ~~Court found that the first two elements had been met but said that the employer had not met the 3~~~~rd~~ ~~requirement.~~
* ~~The first step asks whether the standard that is being challenged has a purpose that is rationally connected to the performance of the job. SCC explains that the inquiry here is general. We look at the general purpose of the standard, rule or requirement and ask whether there is a rational connection to the performance of the job. We don’t look at the particular standard that is set, but rather just it’s general purpose. In this case, we would ask whether requiring firefighters to meet a fitness standard is rationally connected to the performance of the work. Clearly it is. Firefighting is physically demanding work and so requiring the workers to meet minimum fitness standards is rationally connected to the fulfillment of that work.~~
* ~~The second step is sometime referred to as the “subjective component” of the test. This is where we ask whether the employer adopted the standard in honest and good faith belief that it was necessary for the fulfillment of the purpose. This element of the test examines the employer’s motive and state of mind when it adopted the standard being challenged and asks whether the employer acted in good faith. This element of the test is almost always satisfied. Rarely would there be evidence of bad faith on the part of the employer. For example, if there was uncovered evidence that the real purpose behind the fitness standard was to force female firefighters out of the positions because it was known they would be less likely to meet this standard than male firefighter then this subjective element may not have been met. In most cases, this second step is usually satisfied. In the absence of evidence of bad faith, it is easy to conclude that a rule with a purpose rationally connected to job performance was introduced in good faith.~~
* ~~Where the employer failed in this case and where most employer fail to make out BFOR is in the third step. The employer in this case failed to show that running 2.5km in 11 minutes, as opposed to 11 minutes and 49 second which was Meiorin’s best time was reasonably necessary for the safe and efficient performance of the work of firefighting. The evidence did not establish that if a different standard were applied that the safe performance of the job would not be possible. Meiorin, despite being incapable of meeting the standard, had already proven herself to be a very competent fire fighter.~~ 
  + ~~In the third step, the question we have to ask is whether the standard was reasonably necessary for the performance of the work. That in turn requires us to ask whether it would be possible for the employer to accommodate the worker without undue hardship. If accommodation short of undue hardship is possible, then it cannot be said that the particular standard was reasonably necessary for the performance of the work. This is where we find the employer’s duty to accommodate.~~
  + ~~The duty to accommodate to the point of undue hardship is the most litigated issue in HR law. The idea of accommodation was been integral to HR law from the beginning. The idea behind accommodation is to promote the removal of barriers that stand in the way of participation in the workplace by individuals owing to their membership in a protected group. The employer’s duty to accommodate might require the employer to change or relax their workplace standards or change the way the work is performed somehow. It might require them to think outside the box, think of other ways in which the work may be performed while still respecting the employer’s interest. Only accommodation that results in undue hardship to the employer is beyond the reach of HR law. That means that some hardship is to be expected, it is only when it reaches the point of undue hardship that the employer no longer owes a duty to accommodate~~
  + ~~Sometimes fulfilling the duty of accommodation can be fairly straight forward. It could mean rescheduling an employee from the night shift to the day shift (because of childcare obligations) or it might mean purchasing adaptive software or computer equipment for an employee whose vision is impaired. Other times it may be more complicated and require things like reassignment of job responsibilities which may have an impact on other workers and there may also be safety considerations that have to be kept in mind.~~
  + ~~She was successful because her employer could not establish that it was reasonably necessary for her to meet that particular standard.~~
  + ~~In this case, it all turned on the fact that the government could not justify the standard it imposed. It couldn’t show that it was reasonably necessary for a forest firefighter to run 2.5km in 11 minutes. Were it not for Meiorin being a woman and were it not for the statistical evidence that women would be less likely to meet this standard, the case would not have moved forward.~~
  + ~~What the SCC actually decided in this case was that the employer could not establish that it was necessary for any forest firefighter (male or female) to run 2.5km in 11 minutes.~~

#### ~~Undue Hardship~~

* + ~~The duty to accommodate to the point of undue hardship is the most litigated issue in HR law. The idea of accommodation was been integral to HR law from the beginning. The idea behind accommodation is to promote the removal of barriers that stand in the way of participation in the workplace by individuals owing to their membership in a protected group. The employer’s duty to accommodate might require the employer to change or relax their workplace standards or change the way the work is performed somehow. It might require them to think outside the box, think of other ways in which the work may be performed while still respecting the employer’s interest. Only accommodation that results in undue hardship to the employer is beyond the reach of HR law. That means that some hardship is to be expected, it is only when it reaches the point of undue hardship that the employer no longer owes a duty to accommodate~~
  + ~~Sometimes fulfilling the duty of accommodation can be fairly straight forward. It could mean rescheduling an employee from the night shift to the day shift (because of childcare obligations) or it might mean purchasing adaptive software or computer equipment for an employee whose vision is impaired. Other times it may be more complicated and require things like reassignment of job responsibilities which may have an impact on other workers and there may also be safety considerations that have to be kept in mind.~~
  + ~~An employer is not required to accommodate beyond the point of undue hardship which recognizes that some hardship is to be anticipated~~
  + ~~The threshold of undue hardship will be reached only when all reasonable measures of accommodation have been attempted and exhausted and only when we can say that providing any further accommodation would impose too much hardship on the employer~~
  + ~~Accommodation can be costly for an employer because it is up to the point of undue hardship. At the very least, it can be inconvenient and at it’s highest it is on the threshold of threatening the financial viability of the enterprise.~~
  + ~~All this duty asks of an employer is to ensure that it’s workplace rules and standards are reasonably necessary and to show they are reasonably necessary the employer may have to show that they inquired into different rules or different ways of performing the work that would not significantly or negatively impact the employer’s enterprise.~~

### ~~Canadians with Disabilities v Via Rail, 2007 (SCC)~~

**~~Ratio:~~** ~~SCC gave us a list of factors to consider when determining undue hardship. The list is not exhaustive but these are the 6 main factors. It is a fact driven inquiry that depends on the nature of the work, the nature of the required accommodation, the resources available to the employer etc.~~

1. ~~Safety~~ 
   * ~~Safety to the complainant but also to co-workers and the general public~~
2. ~~Size of the employer’s operations~~
   * ~~How much can the employer afford?~~
   * ~~A court will expect more of a sizeable better resourced employer than it will of a smaller operation~~
3. ~~Employee morale~~
   * ~~This needs to be significant. Disgruntled employees or employees who aren’t happy about having a scheduling change or a rebundling of job responsibilities in order to accommodate someone will not amount to undue hardship. It has to be more than mere preferences. It needs to have a significant impact for employee morale to reach the point of undue hardship.~~
4. ~~Interchangeability of the workforce and facilities~~
   * ~~This looks at the size and resources of employer and asks “can workplace adapt to implement flexible work schedule etc?”~~
5. ~~Cost~~ 
   * ~~This needs to be significant. It needs to reach the point of impacting the financial viability of the enterprise and it needs to be proven with clear evidence if the employer wants to make out undue hardship on the grounds of financial cost~~
6. ~~Collective agreement~~
   * ~~In a unionized environment, you must consider the impact on the rights of other employees under the collective agreement~~