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INTRODUCTION

- Modified open book final exam, can bring the table of contents plus three pieces of paper with anything you want on it, can't bring anything else
- What are the express and implied terms in "the employment contract"? How are disputes resolved? What are the remedies when the contract is breached?
    - Old system was "master and servant" relationship - one was essentially indentured to the other
        - Focus was on obligations that the servant owed to the master
    - Has now changed to a contracts context - sees both parties as parties that are in a bargaining position
        - The employer still holds most of the cards
        - Not an equal bargaining relationship - so the case law is interpreted more favouably towards the employee
        - The idea is that the parties are coming together and making a fair bargain between themselves
    - All of the normal rules of contract law will apply
- Distinct from "labour law" - that focuses on labour relations in a unionized context
    - Key difference - the bargaining agent (the union) interrupts the individual contract process assumed by employment law - everything goes through the collective agreement and is interpreted through that lense
    - First step in resolving any employment question - check to see if the worker is unionized or not

Basic Points on Contract Formation

- All of the basic requirements for contract formation apply to employment contract
- Determine what the objective intentions of the parties were at the time that it was formed
- Terms include, but are not limited to: pay, benefits, vacation, entitlement to holidays, work environment, work expectations, review and probationary period, scope of duties, are internal reassignments permitted at the employer's will, under what circumstances can the contract be terminated?
    - Employment Standards Code sets out minimum standards, but there are many exemptions (incl. articling students)
    - Some implied terms will be found in legislation (i.e. Human Rights legislation is always assumed to apply, and cannot be contracted out of)
        - Also, the employee's personal information is protected under PIPPA (also cannot be contracted out of)
- Employees also have implied obligations (largely holdovers from the master/servant relationship)
    - For example, employees owe a duty of loyalty (cannot work for competitors at the same time, must keep confidential information confidential)
    - Also, implies obligations on termination (these can be specifically set out in the employment contract)
    - Notice periods for termination will impose obligations on both sides

Defining "Employee"

- Agents are not employees
- The Directors of a company are NOT employees of that same company
    - For directors to also be employees, there must be a separate employment contract
- Partners are not employees
- Independent contractors are not employees
    - This is a big one, cannot be assumed, and may not even correspond with the parties intent
- Note that, for Crown employees, normal employment law may not apply to them (many are unionized, and in some cases, special statutes may change the employment relationship and dictate different terms in the contract)
    - For some positions that are appointed with delegated statutory power, administrative law concepts may alter the nature of the employment relationship
- "Dependent" contractors are strange - may be considered employees under certain statutes, and contractors under others (i.e. taxes for the CRA)

EMPLOYEE v INDEPENDENT CONTRACTOR TEST

- Becoming a more prevalent issue as contract work becomes more common
  - Contractors can take advantage of significant tax deductions, and are subject to lower tax rates generally than individuals
  - However, employees gain the benefit of the Employment Standards Code, and other statutory protections that are unavailable to contractors
- **Independent Contractor:** Contractor is not dependent on a single "client"
- **Dependent Contractor:** Contractor is largely dependent on a single "client."
  - Will not have the advantage of all employment standards protections, but may have some (Weber v Coco Homes)
  - Dependent contractors ARE entitled to notice and severance pay
  - Essentially, you have many of the indicia of employees, but for CRA purposes, would still be classified as contractors
  - In particular, dependent contractors would be destitute if their main contract was ever terminated
    - The longer you are with a specific client/employer, the more dependent you will likely be
- In a case where a employee is employed with a subsidiary of a larger corporate entity - sue all of them, and then figure out which ones can be successfully sued later
- Every employment contract is IMPLIED to have clauses protecting reasonable notice and reasonable severance
- Privity of contract applies, but it may not apply if the corporation has a complex corporate structure that is designed to limit liability for claims from employees (dealt with in Bagby v Gustavson)
  - Not really about piercing the corporate veil, it is more about looking at the employment relationship to define who the employer really is
    - Thus, the parent and subsidiary could BOTH be the employer if the test in Weber is met on the employer side

Weber v Coco Homes (ABQB 2013)	
Facts	Weber and her holding company (Goldengirl) worked in Coco's show home selling newly built residential homes to prospective buyers. Weber was given the title of Area Manager, Coco provided all supplies, she was expected to work set hours at set commissions, Coco provided all the training, attended weekly meeting. **Importantly, Coco set the pricing, not Weber.** Weber was terminated without notice, and she claims that she is entitled to outstanding commissions and severance. Coco claims Weber is an independent contractor, and therefore is not entitled to statutory severance.
Issues	Is Weber an employee or an independent contractor?
Decision	***The central question is whether the person is in business on their own account, or do they work for someone else? There is no set test to determine this, must consider all of the circumstances.*** • Control employer has over employee's activities • Who provides the tools and equipment • Risk and opportunity? What is at stake for the employee? Does employee share in the profits? • Overall dependence of the contractor/employee on income derived from the client/employer? • Does worker hire their own underlings? Manner of remuneration was solely payment by commission based upon sales performance. Coco paid her through holding company, and Weber made payments for GST directly to government. Weber did not receive any other benefits. Weber claims she was entitled to vacation each year, but this is not so - since she is paid solely on commission, she can take time away, but then she does not realize income. There is no paid vacation implied in the agreement. Weber claims she had an exclusive agreement of employment. This is not entirely true, as she also worked

	as a realtor on the side. Weber argues that Coco had a high degree of control over her operations at the show home. However, Weber hired and fired her own employees, and was otherwise free to manage the affairs of the show home office. Overall, Weber was subject to Coco's control, as Coco provided the product that Weber was to sell and the prices to sell it at. Coco did secret shopper reviews of Weber to monitor her activities, and provided regular performance reviews. These factors outweigh the other indicia of control that Weber had over her operations. As for tools, all of the principal tools (including the office and workspace) were supplied by Coco. As for risk and opportunity, Weber had additional opportunity through working with Coco to obtain clients for her "on the side" realtor business. However, she did not have a direct economic stake in any significant increases in profit realized by Coco. Therefore, she had some risk and opportunity in the venture, but not the full amount. Overall dependence: Weber was not completely dependent on Coco for income, she had financial success as a realtor on the side. She would not be financially ruined if the contract with Coco was terminated. Taking into considerations all the circumstances, Weber is a contractor, not an employee. She had a non-exclusive arrangement, and otherwise had the indicia of a contractor relationship. However, is Weber a dependent or independent contractor? Her relationship with Coco is best described as a dependent contractor, since she relied on Coco for many integral elements of her business, without which, she could not have operated successfully. She is therefore entitled to some degree of reasonable notice, although less than what a full employee would be entitled to. With four years of experience, two months of notice is acceptable.
Ratio	Must take into consideration all of the relevant factors to determine if the person had level of independence indicative of a contractor.

Bagby v Gustavson International Drilling Co (ABCA 1980)	
Facts	Bagby was employed by GIDC, eventually was promoted to President and General Manager. His employment was terminated with the sale of the company's assets and the end of its business by the other holding companies that owned GIDC. Parties agree that Bagby's performance was exemplary. Bagby entered into an agreement which was intended to induce him to remain employed during the sale process. Later, the purchasing company decided to not hire Bagby at the new operation, and instead wound up GIDC and sold off its assets (to itself). At trial, the judge found that the agreement was not intended to reflect the full agreement between the parties, and that Bagby had not bargained away his rights.
Issues	Did the agreement nullify any statutory right to termination pay owing to Bagby?
Decision	Bardal factors should be used to determine the appropriate length of the notice period. The trial judge came to a period of 15 months, and applied the factors correctly. Bagby was also regularly paid bonuses. These are to be included in the calculation of damages for loss of employment if the bonuses had become an integral element of compensation. In this case, the bonuses had become entrenched in the compensation package for many years, so yes, they were integral to the compensation structure and therefore should be included in the damages calculation. Also, fringe benefits that have become an integral part of compensation are to be included in the calculation. These should include premiums for EI and CPP. Bagby's company car should not be part of the calculation, since he was required to reimburse the company for any

	personal use. Also, the company is not required to pay out double the vacation pay owing, since it is unknown whether Bagby would have taken his vacation or elect for a payout of 5 weeks. Bagby was nominally employed by GDIC, but GDIC was effectively under Raymond's control. Raymond Inc "called the shots," and was effectively Bagby's employer. Name "the employer" in the employment contract is not solely determinative - look at all the circumstances to determine who actually controls the employee's work.
Ratio	In determining the proper amount of compensation owed for termination without cause, all elements of compensation that have become integral to the overall compensation package must be included.

TERMS OF EMPLOYMENT AGREEMENT

- Remember, most of the time, you will be dealing with implied terms - most written employment contracts are not comprehensive
- The facts of each case will determine implied terms (officious bystander test)
    - What would the officious bystander have thought the parties agreed to?

Implied Terms from Statute

- There are also implied terms imposed by statute
    - For example, the provincial Employment Standards Code, and the Canada Labour Code (federally regulated employees only) contain implied terms
    - This includes the implied term to reasonable notice and severance pay
    - For the most part, you cannot contract out of statutorily imposed terms

Implied Common Law Terms

- Common law also imposes terms:
    - For example, employees have an implied term of honesty, faithfulness and loyalty (i.e. no sabotaging the company, no stealing, not misusing the company's confidential information)
    - Implied that the employee will follow lawful directions
    - Employees must also provide the employer with reasonable notice of termination.
    - Employers must treat employees with decency, civility and respect
    - Employers have an implied obligation to provide work, and pay employees for that work
    - Employers cannot substantially change the circumstances of the work (the often comes up in constructive dismissal cases, as in Hobbs v TDI)
    - Employers must give reasonable notice for termination without case

Express Terms

- Employment contracts are governed like any other contract - you can include as many express terms as you want PROVIDED the terms are not proscribed by law

When do terms take effect?

- How do you know when terms take effect? When is the contract consummated?
- Once work begins, and once there is sufficient certainty to allow the relationship to operate, you have a contract
- You can amend an existing employment agreement, but consideration needs to pass for it to be legally binding
- Terms will generally take effect once the terms are set to the employee, and the employee accepts those terms. At that point, you have an employment contract
    - Any subsequent changes to an employment contract must be supported by some additional consideration (note that promising to continue the employment contract for a specified period of time can be considered fresh consideration)

Hobbs v TDI Canada (ONCA 2004)	
Facts	Hobbs was a salesperson employed by Urban. A competitor approached Hobbs and offered him employment there on specified terms for higher commission rates. The offer letter indicated that he would be paid an annual draw of $60k against sales commissions, details of which would be provided in a separate letter. Hobbs pointed out that the letter did not specify the higher commission rates that were orally represented to him earlier. TDI manager indicated that these terms would be provided in a separate letter. Hobbs also expressed concern about the expansive wording of a non-compete clause - this was deleted from the letter that Hobbs signed. Later, TDI presented Hobbs with an onerous Solicitors Agreement and indicated he had to sign it if he wanted to be paid. The contract did not contain the more generous provisions that Hobbs had negotiated earlier. Hobbs worked for a few months, and after not getting the pay that he was expecting, he quit. Hobbs is trying to claim constructive dismissal, TDI is claiming that the written contract did not specify the monetary arrangements, and that should be determinative.
Issues	Is Hobbs SOL?
Decision	The main problem here is, when did the employment contract begin? The employer made verbal assurances of the salary and commission rates, but the written contract specifically did not include those terms. The trial judge found that the Solicitor's Agreement trumps any verbal representations made earlier. TDI did not present their initial offer as being conditional on signing the Solicitor's Agreement later. It is POSSIBLE to create an employment contract in installments, but it must be expressly indicated at the outset. It is not possible to sign what is presented as a complete contract at the outset, and to then sign a subsidiary contract later that is more onerous than the original contract (and claim that continued employment is contingent on signing that secondary contract). Also, the Solicitor's Agreement was not presented to Hobbs until after he had already started working - therefore, an employment contract had already crystallized at that point, so it is not possible to claim that the Solicitor's Agreement was essential to the employment contract. The Solicitor's Agreement is better characterized as an attempt to amend an existing agreement. However, as with all contracts, to change a contract with a new agreement, there needs to be additional consideration. TDI claims that the consideration was continued employment, as they would otherwise have fired Hobbs. Court disagrees - the consideration must be more than just simply "keeping your job." Note that there are cases that go the other way, but in the other cases, the option was either continuing employment or financial insolvency of the firm. Consideration can take the form of more generous terms elsewhere in the employment contract. It would be inequitable to allow employers to change employment contracts after employment has begun without consideration. Most often, employees are in their best bargaining position before being offered the job - that power shifts markedly towards the employer after the employment contract has begun.
Ratio	Once the parties have agreed to enough terms to define and crystallize the employment relationship, that marks the beginning of the contract. Changes can be made to employment contracts after the fact, but consideration is required (the consideration must be valuable to the employee, and generally must be more than just "sign it or you're fired"). Employment contracts can be constructed in installments, however, it must be clear at the outset that it will be constructed in installments.

TERMINATING EMPLOYMENT CONTRACTS

Termination Without Cause (Working Notice)

- Employees must give a minimum of two weeks notice of termination (Employment Standards Code)

        - IF the employee does not give proper notice, the employer could seek damages for losses caused by the improper termination
    - Caselaw indicates that senior employees should give a maximum one month's notice
        - Critically, the employer's and employee's notice periods are not equivalent, employers will owe more termination notice to employees than vice versa
    - It is also incumbent on the employer to inform the employee if they will suffer damages as a result of the improper termination
- Employment may be indefinite in the sense that there is no express or specified end date, but that is not the same as employment for life
    - The assumption is that the contract will continue until it is terminated reasonably

Bardal v Globe and Mail (SCC)

- The contractual obligation is to give reasonable notice of termination
- If the employer does not give reasonable notice, they must pay damages equivalent to what they would have had to pay had they given reasonable notice
- It cannot be less than the Employment Standards Code minimums (CANNOT be contracted out of)
- The law DOES NOT require severance - only notice. Pay in lieu of notice is essentially an estimate of the damages that would be owed to an employee instead of allowing them to work during the notice period.
- During the notice period, you must be maintained in the same job (otherwise, constructive dismissal)
- Compensation owed includes other non-salary benefits
- The purpose of severance is to bridge the gap between the old job and the new
    - It is NOT a golden parachute or a windfall
    - The (former) employee is required to make bona fide efforts to secure new employment
    - Essentially, severance is calculated based on how long it is expected to take to find new employment
- **Bardal Factors: (age, length of tenure, rank within company and prospects for re-employment)**
    - No closed fixed list of factors, but these are instructive and intended for guidance
    - Length of service - longer service implies that it will take longer to find new employment
    - The availability of similar other employment elsewhere
        - Position within the company is instructive on this - more senior positions are less plentiful and more difficult to get than junior positions
        - What about consideration for economic realities and the economic cycle? Yes, that must be considered - notice periods will be longer during economic downturns
            - ALIS - Alberta government reports indicating what the approximate demand is and outlook is for different occupations (OCCinfo)
    - Is the position highly specialized? If so, it may take longer to find alternate employment.
    - Are you getting close to retirement? IF so, it is likely that it will take longer to find alternate employment
- In almost all cases, the employment notice period will not be longer than 24 months (this is a maximum set by the SCC)
    - Very rare to see anything close to 24 months
- ***LabourSource on Carswell will help you figure out approximately what the correct notice period is***
    - Remember, this is a rule of thumb only - about 3 weeks for each year of service anyways is a good guideline
        - Does not work well for older workers, highly specialized workers
        - ***Note that you can expressly indicate in the employment contract how severance will be calculated. This overrides the Bardal Factors, and provides greater certainty to all parties.***
    - You can also assist employers by encouraging them to help employees mitigate their damages
        - If the employer offers assistance in finding a new job, or retraining, and the employee refuses, that can be cause to terminate paying severance
        - Can provide job counselling, give letters of reference
        - If you want to get rid of the employee (i.e. not have them work during the notice period), you pay them to stay home and look for a job, stop paying when they find a job. Can provide incentives to find a job earlier than Bardal period (i.e. split the remaining amount between employee and employer)

Termination With Cause

- Occurs when the employment contract is substantially breached
- Balance of probabilities on the employer to establish that a breach has happened
    - If this burden is met, the employee gets bupkis (no severance, no notice)
    - If the employer is wrong, they will be on the hook for damages, potentially for breach of good faith if it was done recklessly

Dowling v Ontario

- Dowling was taking kickbacks in exchange for getting clients deductions to rates they were not entitled to
- Court found that the secret kickbacks were potentially a problem - had also tried to cover it up very poorly after the fact
- Dowling was fired for cause for taking the kickbacks
- Decision
    - Note that old caselaw used to heavily emphasize the duty of fidelity
    - This shifted with McKinley v BCTel - duty of fidelity is contextual, and not being faithful is not always cause for termination
    - Did the dishonesty result in a breakdown in the employment relationship?
        - The employee must have done something deceitful (clearly met in this case)
        - Then, the nature and degree of the dishonesty must warrant dismissal, and render it impossible or untenable for the employee to continue in their position
            - **The core question is whether the employee has engaged in misconduct that is incompatible with the FUNDAMENTAL terms of the employment relationship (must strike at the heart of the employment relationship)**
    - **Determine the nature and extent of the misconduct**
    - **Consider the surrounding circumstances**
        - **Consider role and repsonsibility within the organization**
        - **Type of business or activity that the employee is engaged in**
        - **Was it specifically proscribed in company policy? If so, pretty good case can be made that it is grounds for termination.**
        - **Degree of trust imposed on the employee**
    - In this case, Dowling was in a senior position, kickbacks were clearly outlined as improper in the code of conduct, there was a great deal of trust placed in Dowling to manage public funds honestly
    - **Decide whether the dismissal is warranted (is it proportional)?**
        - **Actions were intentional, occurred over a long period of time, lied about it, were not trivial**
        - **Yes, dismissal was warranted. It is very problematic in particular since a high degree of trust is required for the employee to do their job properly**

Termination With Cause

- The employee has done something that makes continued employment untenable.
    - Very fact specific inquiry, within ambit of
- On balance of probabilities, is the employee's conduct so reprehensible that it makes their continued employment untenable?

Culpable Misconduct

- **Culpable misconduct** - you do something (or don't do something) on purpose that is contrary to the employment contract (Whitehouse, Polquin, Hodgins)
    - I.e. stealing, sexual harassment, lying
    - Three part legal test (from Dowling):
        1. **Determine nature and extent of misconduct**

- **Essentially, what happened?**

2. **Consider the surrounding circumstances**
   - **Question of context - consider the employee's tenure, position, nature of business, whether there is a code of ethics**
3. **Decide whether the dismissal is warranted (is it a proportional response)?**
   - **Is the misconduct so egregious that it renders continued employment untenable? Is it fundamentally incompatible with the nature of the employee's position?**

Incompetence

- **Incompetence** - you're crappy at your job (Henson)
  - Different legal test - require warnings to the employee (employer must prove this)
  - Based on concept of "progressive discipline" - meaning you cannot just jump right to termination
    - At common law, it doesn't matter why an employer fires the employee, freedom of contract prevails - can terminate at will provided termination provisions in the contract are followed

1. **Employee must be given express and clear warnings about performance.**
2. **The employee must be given a reasonable opportunity to improve their performance after the warning is issued.**
   - **Must also be aware that failure to meet the standard could lead to termination**
   - **Each employer is entitled to set their own performance standards, there is no objective standard**
3. **Notwithstanding the warning or opportunity, the employee has failed to meet the standard.**
4. **The cumulative failings of the employee would prejudice the proper conduct of the employer's business.**

Non-culpable Misconduct

- **Non-culpable misconduct** - The employee is no longer physically or mentally capable of performing their job (Whitford)
  - Note that employers cannot discriminate against someone on the basis of disability
  - Disability includes addictions issues (alcoholism, narcotics)

Two part test

1. **Employer must prove that the employee's ability to fulfil workplace duties is impaired by the disability.**
   - **Employer has to provide clear warnings to the employee that their work is being impacted by the disability**
   - **Has the employer accommodated the employee to the point of undue hardship?**
   - **Human Rights Code enters into the analysis here - under the HRC, you cannot fire someone for certain enumerated grounds, including disability (this includes giving the person pay in lieu of notice to make them go away).**
   - **Thus, it is possible to meet your common law contractual duties, but you may still be in breach of the Human Rights Act.**
   - **Note that remedies under the Human Rights Act are HUGE - could be wages lost plus a bit extra up to the hearing date, much longer than contractual rights or rights under Employment Standards Code**
   - ***You can only discriminate under the Human Rights Code if complying with the code will cause undue hardship to the employer (i.e. the level of accommodation is simply too high)***
2. **Determine whether any improvement is likely in the foreseeable future.**

Dowling v Ontario (ONCA 2004)

Facts	Dowling employed for 25 years with Ont WCB. His job is to assess recipients of WCB benefits to determine eligibility. He got to know Lazar sexually, and he lobbied the WCB to get her lower premiums. Lazar also sells Dowling computers at a reduced price, and he reduced the computer company's premiums significantly. Then, Dowling adjusts a second company downwars for Lazar and receives $$$ in return. When investigators

	ask him if he received consideration (either in the form of cheap computers or money), he admits to the computer but does not disclose the cash. Lazar and Dowling then fabricate a fictitious loan agreement to justify the $$$. Dowling is then fired with cause.
Issues	Was the employer justified in firing Dowling with cause?
Decision	YES. Applied the test in McKinley: • Dowling took money and computers in breach of the employee's policy on conflict of interest, and he then tries to lie to cover it up • The surrounding context - A great deal of trust was placed in Dowling, trust is absolutely required for him to do his job properly • The conduct is irreconciliable to the employment relationship because the conduct was intentional and continuing
Ratio	Apply the McKinley test - if the wrongdoing makes it impossible for the employee to faithfully perform duties, then he may be fired with cause.

Whitehouse v RBC Dominion Securities (ABQB 2006)

Facts	Employee worked for RBC for 16 years. Earned about $425k on commission. Brings prostitutes to the office after hours and sexes them. When questioned about it by senior management, Whitehouse lies until confronted by video evidence. RBC finds out and fires the employee.
Issues	Did the employer have sufficient cause to terminate without notice?
Decision	YES. Under RBC Code of Conduct, all employees have a duty to uphold the law, to maintain the confidentiality of clients and to maintain their integrity. This, in particular, is noted as being critical for senior employees, such as Mr. Whitehouse, who are expected under the Code to set the standard for lower level employees to emulate. Employee breached the code of conduct by brining prostitutes into the office and showed contempt for RBC and its reputation in the business community. Also, the Court found that Whitehouse left a prostitute alone with confidential customer information, which violates his duties of confidentiality. Once RBC got tipped off, Whitehouse lied to try to cover it up. His position requires honesty with his employer. **Any response short of termination would have undermined the public's confidence in RBC's management, and set a poor example for other employees.**
Ratio	Activities in the office which do not necessarily directly relate to job performance can lead to termination if the activities would otherwise harm the company's reputation and undermine management. In particular, if codes of conduct are deliberately breached and the breaches are then covered up, that is sanctionable conduct.

Poliquin v Devon Canada Corp (ABCA 2009)

Facts	Poliquin was employed by Devon for 26 years. At the time of termination he was in a supervisory position as a production foreman. Poliquin accepted free landscaping services at his personal residence from Devon suppliers which Devon argues is in violation of their code of conduct, and he also used Devon's computer equipment and internet access to transmit pornographic and racist material, also in violation of the Code of Conduct. Poliquin induced one of his subordinates to assist him with the landscaping. Poliquin argues that he had a reasonable expectation to privacy for the email transmissions, and the emails and the landscaping activities fell outside of the employment relationship, and therefore should not be grounds for termination.

	Note that, otherwise, Poliquin's work performance was exemplary.
Issues	Did the employer have sufficient grounds to terminate without notice?
Decision	It is clear that Poliquin received valuable landscaping work without paying for it from Devon clients, and that he sent pornographic emails using his work computer. It is appropriate to assess the cumulative impact of different acts of misconduct to determine if they collectively justify the termination (that is, it is not necessary to prove that a single act of misconduct alone is sufficient for termination). Poliquin abused his position of authority in using a subordinate to organize the landscaping, and it was clearly in violation of the corporate conduct policy in place by the employer. For the pornography, Devon gave Poliquin several warnings about its policy regarding pornography on work computers, and he persisted and tried to cover up the actions. Despite his supervisory position, he took no steps to stop the flow of pornography into the office. He also forwarded racist emails to Devon employees and customers, which could reasonably be expected to damage Devon's reputation to both lower level employees and clients. Management is entitled to do its best to ensure a non-sexist and non-racist environment. The Court notes that dismissal could be justified on either ground in isolation. Can also use the cumulative impact doctrine to get him too. Also, the fact that the entire oil industry has problems with sexism and racism is no defence, especially where there is a company policy in place.
Ratio	Dismissal without notice can be justified even when actual job conduct is good. Cumulative acts of misconduct can together be grounds for termination if there is a common thread between them that makes continued employment impossible.

Hodgins v St John Council for Alberta (ABQB 2007)	
Facts	Hodgins was second in command at St John Ambulance and manager of Edmonton branch. He helped design sexual harassment policy for all councils across Canada in 2003. He later expressed reservations about the policy, claiming that it should require that the harrasser subjectively know that what they are doing is considered sexual harassment and is not wanted by the victim. Later, at a company Christmas party, some of his own words and actions gave rise to a sexual harassment complaint from a female subordinate, leading to his dismissal. He had made a joke during his speech that a younger employee (not the complainant) had been the youngest person to get his clothes off that fast in a long time when he was almost late arriving (and had to change quickly to do so). Later that night, Hodgins said that the complainant's hair was nice, and he touched her shoulder at one point. The complainant did not file a complaint for weeks, claiming that it could negatively affect her employment status.
Issues	Did Hodgin's actions rise to the level of sexual harassment, warranting summary dismissal?
Decision	Hodgins argues that he was only trying to joke and be friendly at the party, and in the alternative, if any of his actions did rise to the level of harassment, they were not sufficiently serious to warrant summary termination. Justice Clackson finds that while the joke in the speech was ribald with a sexual innuendo, it falls short of sexual harassment. The other actions did constitute sexual harassment because they made the complainant uncomfortable, even if that was not Hodgin's intent. In applying the McKinley test, Justice Clackson found that the misconduct did not rise to a level that is sufficiently serious to warrant summary termination. There is a scale of seriousness for sexual harassment from making sexual jokes to full blown sexual assault, and Hodgins actions all fall in the low range of that

	scale. There is no evidence that the workplace environment suffered, and the complainant even thought that termination was excessive. Further corrective actions and sensitivity training should have been explored before resorting to summary termination. Awards Hodgins $100,000, representing 12 months' pay for severance. The first two parts of the McKinley test are satisfied, but the third is not.
Ratio	Again, must apply the McKinley test to determine if the misconduct rises to a level of seriousness that warrants termination. If the misconduct does not materially affect the workplace or the ability of the employee to do their job, then it will not reach that threshold.

Henson v Champion Feed Services (ABQB 2005)	
Facts	The employee is a shift foreman at a feed company for seven years. He received 5 verbal and 1 written warning for poor performance issues during the seven years. However, he also received a promotion, yearly pay increases and bonuses. He was dismissed with cause after wrongly mixing a batch of feed and allegedly trying to cover it up after the fact. The company claimed that the termination was the result of cumulative performance issues over the last seven years.
Issues	Did the employer have sufficient cause to terminate without notice?
Decision	NO. Six months' notice is appropriate in the circumstances. There was no cause to fire the employee because there was no progressive system of discipline in place, and while he had been sanctioned for conduct in the past, he also had been rewarded when he did his job well. The progressive system of cumulative misconduct was described by the Court: • Give the employee a clear and express warning about performance issues ○ Warnings were given, but at no point did the employer indicate that termination was possible if standards were not met • Henson would not reasonably have believed that termination was possible ○ Also, sent mixed messages by promoting him and giving him raises Give the employee a reasonable opportunity to improve after the warning Assess whether the employee has failed to improve despite (1) and (2). IF no improvement is seen, consider whether the cumulative failings would be sufficient to prejudice the employer's business. Note that this case deals only with poor performance, not with misconduct. Misconduct fundamentally violates the employment relationship (as in McKinley and Dowling), but poor performance requires the progressive system illustrated above for it to rise to the level allowing for firing without notice.
Ratio	For firings related to poor performance, must use a progressive system of feedback and response to determine whether the performance issues rise to the level allowing for firing without notice.

Whitford v Agrium Inc (ABQB 2006)	
Facts	Whitford worked for 22.5 years with Agrium, in the last year he was promoted to supervisor (thus leaving his unionized shop position). Agrium recognized that he had developed an addiction to alcohol and was clinically depressed. As a result of these conditions, he missed a significant amount of time off work. Some of the absences, including to go to rehab, were sanctioned by Agrium, others were not. Eventually, he missed a month of work, HR indicated to him that he needs to develop a return to work plan. Whitford obtained a note from psychiatrist indicating he needed more time off, but was fired anyways. His last week was allegedly without leave of Agrium, and so he was summarily terminated. Note also that Whitford had access to a six month short term disability program that he could have availed himself if he was not terminated.

Issues	Was Whitford terminated wrongfully?
Decision	Yes, Whitford was wrongfully terminated. His frequent absences were not accompanied by warnings, and Whitford's absences had been approved on several occasions in the past. For his depression and alcoholism, the Court found that the employer had a duty to accommodate known disabilities (both alcoholism and depression are disabilities). Failing to come up with plans to allow for rehabilitation and continued participation in the workplace leads to wrongful dismissal. Under Human Rights Code, the employer must accommodate the employee up to undue hardship - this cannot be sustained since he was contractually entitled to six month disability leave provision. For the second part of the test, Agrium tried to lead evidence that after Whitford got fired, he went on a colossal bender for three months as proof that he could not get better in the foreseeable future. The Court disagree, events that happen after the termination are not relevant to determining whether, at the time of termination, you have just cause to fire.
Ratio	Employers have a duty to accommodate employees who are later diagnosed with medical conditions, and cannot summarily fire them if performance issues arise that are directly linked to the disabilities.

Constructive Dismissal

Employee is still employed technically, but the employer has changed the employment contract unilaterally in a way that is detrimental to the employee

- The employee can either accept the new contract, or reject the contract and take the position that they have been constructively dismissed (and are therefore owed pay in lieu of notice)
    - If the employee accepts the contract changes, continued employment can constitute new consideration if failing to accept the changes would result in termination without cause

THE FARBER TEST: Would a reasonable person in the same situation as the employee have felt than an essential term of the employment contract had been unilaterally changed to their detriment by the employer?

Note that the courts will allow employees some time to think about whether to accept changed terms in their employment contract - the employee does NOT need to resign immediately when presented with changed terms of employment

Pathak v Jannock Steel (ABCA 1999)	
Facts	Pathak employed by Jannock for 18 years. Promoted to management and received a significant bonus. In 1992, the bonus program was extended to all employees. Pathak felt he was deserving of more, so he asked for and received a bonus on top of the program bonus. Later in 1992, he was asked to manage a second plant and was given an additional salary for it. In March 1993, the second plant was taken away from him, but he kept the bonus program and the 50k salary that was added to his compensation, but the extra bonus he was given earlier was taken away. He is claiming constructive dismissal.
Issues	Was the elimination of the extra bonus constructive dismissal?
Decision	The test for constructive dismissal is whether a reasonable person in the place of the employee would perceive that the terms of the employment contract had fundamentally changed to their detriment. If the employee protests the change and does not accept them, they can claim constructive dismissal instead. At trial, the judge ruled that there was no constructive dismissal. This was overturned on appeal. The CA found that the custom bonus was negotiated by the employee with the employer specifically to recognize performance in job duties prior to when he was given the second plant to manage. Taking that bonus away unilaterally fundamentally changes the employment relationship between the parties in a way that is prejudicial to the employee. Pathak never accepted the changes.
Ratio	The test for constructive dismissal is whether or not there has been a unilateral change to a fundamental

	term of the employment contract to the employee's detriment, NOT whether there has been a fundamental breach to the overall employment contract (which would be a higher standard).

Hamilton & Olson Surveys v Otto (ABCA 1993)

Facts	Hamilton & Olson was hemorrhaging money, and conducted an analysis of its compensation finding that it was paying its employees far higher than the industry standard. They unilaterally dropped amount of vacation pay for all employees, and dropped the matching RRSP program. Base salary remained the same, but overall, compensation was being reduced by about 8% in aggregate. Two employees claim constructive dismissal.
Issues	Can an employer use economic hardship as an excuse to unilaterally reduce compensation to employees?
Decision	The benefits that were cut were collateral benefits, not essential terms of the contract (actual salaries were not reduced). The Court finds that, in tough economic times, employers can cut benefits without it amounting to constructive dismissal. However, note the limited scope of the case - salaries were not reduced. Therefore, if the core compensation of the employees were reduced, even if the employer was in some financial distress, that would likely still count as constructive dismissal since it fundamentally alters the employment contract under the objective test. **Provided salaries are maintained, reductions in benefits as a result of financial duress will not be considered a fundamental breach of the employment contract.**
Ratio	In tough economic times, employers can cut benefits without it amounting to constructive dismissal. However, note the limited scope of the case - salaries were not reduced.

Alguire v Cash Canada (ABCA 2005)

Facts	Employee was the President of Cash. Worked on a series of fixed-term employment contracts that expired on January 31 each year. As of January 31 of each year, if the company met certain performance targets, Alguire would get a bonus. In late 2002, he was asked to finish the remaining contract at home, his decision-making abilities were removed, and while he continued to receive his base salary, he did not receive a bonus. The last contract expired on January 31, 2003 and was not renewed.
Issues	Can constructive dismissal be found in the case of fixed term contracts?
Decision	YES, it makes no difference whether the contract is for a fixed term or is indefinite - the same test will apply. If the employer fundamentally alters the employee's working conditions or compensation to the employee's detriment, then the employee can claim constructive dismissal, even if it is only for the remainder of a fixed term. Also considered was the issue of the bonus. He was on track to meeting his performance targets when his employment conditions were modified in late 2002, but thereafter the company went into a tailspin and did not ultimately meet the performance targets. The CA sends the case back to the trial level for final determination, but finds that the test is whether he more likely than not would have met the performance target if he had not been constructively dismissed early. If so, that would entitle him to payment of the bonus.
Ratio	It does not matter whether an employee is on a fixed contract, the same test for constructive dismissal can apply. For bonus targets, must look objectively at whether the employee would likely have met the target if not for the constructive dismissal to determine if that should be computed as part of the damages.

Magnan v Brandt Tractor (ABQB 2007)

Facts	Magnan had 38 years of service with Brandt. He reached the company's mandatory retirement age in 2004, and was informed that he would be dismissed without severance as of December 31 of that year in compliance with the retirement policy. Magnan protested that he would not retire, but in November, Brandt announced that it had already hired his replacement. Brandt then claimed that Magnan had misrepresented his intentions by allowing a replacement employee to be hired and for accepting retirement gifts from the company. Also, note that Brandt had Magnan take the replacement employee to see all of his sales contacts to "hand the reins" over. Magnan claims that it is impossible for him to "return to work" because of this when Brandt offers him the chance to return. Note that, in SK, the SK Human Rights Act does not protect against age-based discrimination. Brandt Tractor was based in SK, but Magnan was employed in AB.
Issues	Does the invocation of the company's mandatory retirement policy constitute constructive dismissal?
Decision	Magnan was constructively dismissed once the replacement employee was hired. He had protested that he was being forced out, and had taken steps through the lawyer letter to inform Brandt that he had no intention of retiring. Brandt decided to proceed anyways, and that constitutes constructive dismissal entitling the employee to damages. Brandt's later attempts to claim that Magnan was free to return to work for part of the notice period is unfounded - Magnan's position had been changed significantly as a result of the new hire (That is, if he had returned, he would be coming back to a significantly different job), and it was reasonable for him to refuse to return to work under changed circumstances that are detrimental to him.
Ratio	Constructive dismissal can be found when the employee protests major changes before they occur, and are entitled to not return to work for part of the notice period if the detrimental changes are put into effect.

Irvine v Jim Gauthier Chev Olds (MBCA 2013)	
Facts	Irvine was general manager for new car sales for 19 years. Was diagnosed with diabetes in 2005, and by 2007 he completely lost sight in his right eye. In 2009, the dealership owner told him to either go on long-term disability to be fired without notice. The employer contends that the meeting was intended to inform Irvine that his job performance was being negatively affected by his condition, and he needed to take time off to deal with the illness (and apply for disability benefits instead). Irvine protested, and never filed for long term disability. Gauthier hired a replacement. Note that, at the time, the employer had no medical evidence regarding Irvine's condition, its prognosis, and how it would affect his job.
Issues	Was Irvine constructively dismissed?
Decision	The critical ground is whether Gauthier was constructively dismissed, not actually dismissed with cause. Constructive dismissal can occur when an employee refuses to acquiesce to a fundamental change in the employment contract to their detriment. A forced leave of absence in particular can constitute constructive dismissal, particularly if the leave is indefinite and there is no guarantee of re-employment afterwards. **This is assessed on an *objective standard* - whether the employer actually intended to terminate the employee's contract is irrelevant to the analysis.** Must look at whether any meaningful dialogue took place about the change, or whether it was presented as a fait accompli to the employee. The employer bears the onus of responsibility to demonstrate that the illness completely frustrated the employment contract. There is no evidence to show that the illness completely frustrated Irvine's ability to do his job. The fact that Irvine "quit" his job after the fact is irrelevant - by that point, the employer had already constructively terminated the employment contract.
Commentary	Note that, if this case was litigated in Alberta, it would be argued very differently due to the operation of

	the Alberta Human Rights Act. Under the HRA, the employer would need to prove undue hardship in accommodating the employee. In Alberta, Irvine would likely have appealed to the Human Rights Tribunal, and not gone to the ABQB to try and get a constructive dismissal suit. Note also that the HRA has a shorter limitations window than the Limitations Act (one year as opposed to two).
Ratio	Constructive dismissal can be found if an employee refuses to acquiesce to a fundamental change in the employment contract, including refusing to go on long term disability at the employer's request. The employer bears the onus of proving that the employment contract was frustrated by the employee's illness.

Potter v New Brunswick Legal Aid Services (SCC 2015)

Facts	NB Legal Aid Services appointed Potter as executive director for seven year term. After four years, the parties began negotiating a buyout of the contract (no rationale given in the case). Before this was resolved, he took sick leave. During the sick leave, Legal Aid recommended to the Minister of Justice that Potter be terminated for cause (did not want him to continue working there). Also sent a letter to Potter informing him that he was not to return to work until he received notice otherwise that he was permitted to. He was suspended indefinitely with pay and powers were delegated to a replacement. When Potter commenced constructive dismissal action, Board cut off pay (arguing that suing them is contrary to his duty of fidelity, and is tantamount to him quitting).
Issues	Was Potter constructively dismissed?
Decision	YES, Potter was constructively dismissed. The express terms of his contract were found in the Legal Aid Act, which did not contain reference to suspensions for administrative reasons and thus did not contain an express grant of authority to suspend Potter with pay. Importantly, while Potter had agreed to negotiate a buyout, that does not mean that he has acquiesced to a fundamental change in the employment contact. IT was reasonable for Potter to view, objectively, that the unilateral suspension amounted to a substantial change to his employment contract. This case highlights that it is important for employers to maintain clear lines of communication with employees that are on leave, and warns against using unjustified suspensions (which could be considered constructive dismissal). **In this case, a pattern of conduct by the employer made continued employment intolerable.** You do not need to show that a single event terminated the contract, a pattern of behaviour can establish this. For example, this could apply in situations where employers allow workplace harassment to continue over a period of time, rendering continued employment intolerable. The SCC has slightly generalized the constructive dismissal test. The SCC affirmed the Farber test, but clarified that it can be applied more generally and contextually. Also, the SCC affirms that employers are required to provide employees with work. Simply paying an employee to stay home will not continue the employment contract. This is significant for occupations that have a significant reputational benefit to consider. Even for an ordinary employee, benefits are derived from just performing the work.
Ratio	Just because an employee enters into negotiations for a buyout, that does not mean that the employee has acquiesced to a fundamental change in the employment contract (That is, not until they have signed the buyout agreement).

Fixed-Term Contract

Most contracts are indefinite, but it is possible for employment contracts to indicate a terminal date in the original contract

For indefinite term contracts, it is implied that the parties will need to give reasonable notice that the relationship is coming to an end

- This is different for fixed-term contracts, once the term ends, the agreement ends, and no notice is required

Fixed term contracts require unequivocal and explicit language, as any ambiguities will be interpreted strictly against the employer's interests (Alguire)

Also, note that in some employment relationships, certain terms of the employment relationship will be subject to yearly contracts, but the overall employment contract is intended to be indefinite

Alguire v Cash Canada (ABCA 2005)	
Facts	Employee was the President of Cash. Worked on a series of fixed-term employment contracts that expired on January 31 each year. As of January 31 of each year, if the company met certain performance targets, Alguire would get a bonus. In late 2002, he was asked to finish the remaining contract at home, his decision-making abilities were removed, and while he continued to receive his base salary, he did not receive a bonus. The last contract expired on January 31, 2003 and was not renewed.
Issues	Can constructive dismissal be found in the case of fixed term contracts?
Decision	YES, it makes no difference whether the contract is for a fixed term or is indefinite - the same test will apply. If the employer fundamentally alters the employee's working conditions or compensation to the employee's detriment, then the employee can claim constructive dismissal, even if it is only for the remainder of a fixed term. Note that Bardal factors will not be used to calculate the severance period, damages will only go up to the expiry of the fixed term. Also considered was the issue of the bonus. He was on track to meeting his performance targets when his employment conditions were modified in late 2002, but thereafter the company went into a tailspin and did not ultimately meet the performance targets. The CA sends the case back to the trial level for final determination, but finds that the test is whether he more likely than not would have met the performance target if he had not been constructively dismissed early. If so, that would entitle him to payment of the bonus.
Ratio	It does not matter whether an employee is on a fixed contract, the same test for constructive dismissal can apply. For bonus targets, must look objectively at whether the employee would likely have met the target if not for the constructive dismissal to determine if that should be computed as part of the damages.

Quitting

If a reasonable person in the employee's position would understand that s/he has been dismissed, then it is not possible for them to resign voluntarily, the courts will find constructive dismissal

Deciding between dismissal and resignation is fact-specific and objective - look to the particular industry and its practices

If an employee resigns in the heat of an argument, the courts will allow them 1-2 days for a cooling off period where they can rescind their resignation

Also, the employee must SUBJECTIVELY intend to resign - even if they OBJECTIVELY can be viewed to have resigned, that alone is not sufficient to find a voluntary resignation

Scorgie v CCI Industries (ABPC 2008)	
Facts	Scorgie hired as sales representative by CCI. Four years later, at time of termination, he was making $65k per year plus $15k in incentive bonuses. In 2006, company was exceeding commercial expectations, thus entitling Scorgie to a performance bonus for that fiscal year. In summer of 2006, CCI presented Scorgie with a new employment contract as it wanted to promote him to Sales Team Lead. Scorgie contends that the contract did not increase his compensation, but did increase his responsibilities. Also, the description called for a candidate who had an engineering degree, which Scorgie did not possess (did not have requisite level

	of expertise to make technical recommendations to clients). CCI advised Scorgie that, if he did not accept the new contract, then there was no other position available for him in the company, and that he would need to resign his employment otherwise. Scorgie refused to resign, but CCI claims that he did constructively resign and removed him from the property. He was given no termination pay.
Issues	Did Scorgie resign, or was he constructively dismissed?
Decision	A resignation must be clear and unequivocal - it must objectively reflect an intent to resign. CCI argues that the surrounding circumstances showed an unequivocal intention to resign. In this case, Scorgie did not show a clear intention to resign. No reasonable person reviewing the circumstances could objectively view his actions as anything other than succumbing to the wishes of his employer. If an employer gives an employee a "take it or resign" option regarding their employment contract, that will never constitute a true willing termination on the employee's part - and severance will be owed. Note that the Court found that the employer did not intend to constructively dismiss the employer, and revised the employment contract for legitimate business purposes. None of that matters to the analysis.
Ratio	If an employer gives an employee a "take it or resign" option regarding their employment contract, that will never constitute a true willing termination on the employee's part - and severance will be owed.

Frustration

For disability insurance plans, there are often three stages that are applied (note that this will vary depending on the insurance contract):

Elimination Period (90-120 days) - the employee receives no benefits and must cover costs themselves

Short term disability (up to two years after injury) - Employee will receive about 2/3 of salary (test is - can you work within your own occupation?)

Long term disability (> two years after injury) - The employee will continue to receive benefits if they are disabled to the point that they cannot do any occupation for which they are reasonably qualified by education, training and experience.

The employer has a legal obligation to accommodate the injured employee to the point of undue hardship (under the Alberta Human Rights Act)

If that threshold is reached, then the employment contract is terminated by reason of frustration

Insurance contracts cannot modify duties owed by employers to employees via the Human Rights Act

Simpson v Cooperators (ABQB 1994)	
Facts	Employee hurts her back is off work on two years on short term disability. At the end of the two years' short term disability period, Cooperators alleges that Employee failed to provide required proof that she was totally and permanently disabled, and therefore denied her long term disability coverage. Her doctor indicated that she would not be able to do any heavy lifting (as required by her job), but otherwise that she could work in capacities that do not involve heavy lifting. Cooperators claims that this constitutes sufficient capacity to do modified work, which disentitles her to long-term disability benefits.
Issues	Should the employee be entitled to long-term disability benefits due to contract frustration?
Decision	No. The test for long term disability benefit eligibility is more difficult to meet than eligibility for short term disability benefits. To qualify for long-term disability benefits, the employee must be wholly and continuously prevented from engaging in any occupation for wage or profit for which he or she is qualified or may reasonably become qualified by reason of education, training or experience. In this case, the evidence does not rise to the higher threshold. The burden is on the employee to demonstrate eligibility, and the employee has not met that burden here. Insurance policies are just contracts, and she breached the requirements of the contract.

	Was the employee unlawfully dismissed? No, this fails on two grounds: (1) she failed to demonstrate that she was discharged from her occupation, (2) evidence supports the inference that she abandoned her job, and therefore her contract of employment.
Ratio	Test for qualifying for long-term disability is more onerous to meet than short-term disability

COMMON LAW DAMAGES RELATING TO DISMISSAL

- You cannot get an award for specific performance for employment contracts
  - For example, a Court cannot order that an employee show up to work on time
  - However, if you work in a union, the collective agreement may allow for equivalents to specific performance if provided for
- Bardal factors used to calculate notice period, damages based on value of salary and benefits that would have been received during that period
  - If a fixed-term contract, the damages will be awarded up to the terminal date of the contract
  - Damages are equivalent to reasonable notice period had reasonable notice been given by the employer.
  - **Essentially, you are entitled to all of the remuneration you would have received had you have worked during the notice period**
- Damages are assessed as of the date of the breach of the contract - subsequent actions are not relevant
- **Remember that some contracts will specify what the notice period is - cannot be less than Employment Standards Code, but can supplant the Bardal factors**

Bonuses

- The damages will include all substantive remuneration that would have been owed - includes bonuses (if a normal part of compensation), value of benefits (i.e. car allowances)
  - **Bonuses have two aspects** - bonuses earned but not paid out up to date of termination (easy to calculate), and bonuses that would likely have been earned had employment continued for the duration of the notice period (can take an average of bonuses earned recently to determine what is more likely than not to happen in the ***future as of the date of termination*** - what actually happens to the company does not matter as per Hansen)
  - Question: ***is it more likely than not that the employee would have received a bonus had they not been improperly terminated?***
    - IF the bonus is DISCRETIONARY - look at what happened in the past. IF they commonly received discretionary bonuses, then it is assumed that it would continue in the future.
    - Also look at whether there is a company policy in place that would have precluded bonuses.
  - If the bonus payout is contingent on being employed on a specific payout date:
    - If the payout date is within the notice period, then it is factored into compensation
    - If the payout date is outside of the notice period, look at actual practice to determine if it is expected that the company will payout bonuses early

Company Vehicles and Equipment

- ***For company vehicles and company equipment***
  - Guiding principle is that, if the primary purpose of the vehicle and equipment is to assist in the performance of job functions, then there is no damage for loss during the notice period (will not be part of damages calculations)
  - However, if they are partially and fully used for personal reasons, then that will be factored into the calculation
    - IF it is being recognized by the CRA as "employment income" - then it should be calculated as part of damages

Accrued Vacation Time

- ***What about accrued vacation time?***
  - Employers can either pay additional 4% per paycheque for vacation pay, or give a certain amount of time for paid vacation time
  - If the employer has been paying out vacation pay each paycheque, then there is nothing in addition that needs to be added to the calculation
  - Otherwise, if the employee has unpaid vacation time accrued, then that will also need to be paid out

Stock Options

- ***Stock options***
  - Will often be subject to specific vesting dates
  - Will normally be governed by a separate contract that will specify what to do if employment is terminated
    - Remember, the contra proforentem rule will apply here
      - HOWEVER, once the employee is a shareholder or director, courts may consider it a business transaction, and not apply the contra proforentem rule
  - For example in Hansen, the stock option contract indicated that it would only apply for 90 days after termination - any options that are set to vest past that 90 day period are lost

Pensions

- ***Pensions***
  - For **defined contribution pensions** - what it's worth is what is typically put in
    - Normal contributions will be added for the duration of the notice period
  - For **defined benefit pensions** - it's more complicated
    - Eventual pension entitlement is calculated based on a formula looking into years of service, age when retired, average of top five earning years, etc.
    - In this case, an actuary must look at what the pension plan would likely be worth at retirement by the end of the notice period
    - Don't do this yourself

Short/Long-term Disability

- **Short term and long term disability**
  - The employer becomes a de facto insurer for the notice period, if the employee would have been entitled to claim these benefits themselves
  - Should advise clients that need these benefits to get their own insurance after termination, and claim the cost of the premium as part of the damages

Bardal Damages Applied to Successor Corporations

- What happens if your employer is purchased by another company?
  - Technically, your employment contract terminates when the original company is dissolved
  - If you buy the company as a going concern, you are continuing to operate the company as it was before. However, if you buy the company's assets only and otherwise dissolve the corporation, then what happens?
    - **For going concern takeovers** - damages for termination will be calculated based on original hire date
      - IF the business operated continuously, then it is likely sold as a going concern
    - **For asset purchase takeovers** - damages for termination will be calculated based on original hire date (implied) unless the new employment contracts EXPLICITLY state that past seniority will not be taken into consideration
      - If the previous business essentially terminated for a period, and then restarted later, then it is possibly an asset purchase

Hansen v Altus Energy Services (ABQB 2010)	
Facts	Hansen employed by Altus for 29 years as a senior manager. When he started employment, it was with Dominion Bridge, which was later acquired by Nusco, which was later acquired by Altus in 2006. Hard times came to Altus, required them to reduce hours and compensation as an alternative to laying employees off. Accordingly, Hansen's pay was cut by 20%. In 2009, Altus informed Hansen that he would be expected to take on a different role in the organization, and he expected that his salary would return to its previous level. He tranferred his duties to other workers, and maintained menial tasks while waiting to start the new position. Senior management was later fired, and new President decided that the new role was not worth it. Terminated Hansen, gave him one year's salary and no benefits as severance.
Issues	Was Hansen wrongfully dismissed? If so, what severance is he entitled to?
Decision	Was wrongfully dismissed (obvs). Employer argued that damages should be calculated on basis of 20% reduced salary. Court disagrees, finds that Hansen was underpaid for the last months of his employment contract, and dismissed argument that lower salary was due to new duties (new position was a step up in terms of overall responsibility). Also, his bonuses should be incorporated into calculation if they have become an ***integral part of normal yearly compensation***. The Court does not care if Altus was profitable after the employee was terminated - the test looks at past work history and whether bonuses were historically awarded. In this case, the Court took a historical average of bonus as a percentage of base salary to come up with an overall bonus of 21% of base salary for the termination period. For stock options, the contract specified that they could only vest within 90 days of the termination - therefore, he loses all stock options that were set to vest past the 90-day period. Used the Bardal factors to determine length of notice period - settled on full 24 months. This was due to employee's older age, long service, senior position, and limited prospects coming out of employment. It would be difficult for Hansen to find equivalent employment, even taking into account his advanced education.
Ratio	Use the Bardal factors to determine appropriate length of notice.

Radwan v Arteif Furniture Manufacturing (ABQB 2002)	
Facts	Employee is 64 years old, has poor English skills. Was fired for incompetence on February 10, 2000. Was given the Employment Standards Code minimum notice. He had been working for the company since 1995 (five years tenure), but argues that he was employed with predecessor company since 1975 (25 years tenure). The employer argues that they only purchased the predecessor company's assets, and did not inherit employment contracts (new contracts were signed with retained employees).
Issues	When does length of service begin? At the start of employment with the predecessor company, or at the point that the new employment contract was signed with the successor corporation?
Decision	The employee is entitled to severance calculated on the basis of 25 years of service. The Bardal factors are used to determine appropriate notice period: the employee has poor English skills, and is over 45 years old - both of these contextual factors suggest that he will have a more difficult time obtaining alternate employment. The successor corporation ***never made it explicit to Radwan that he would not get credit for past service*** - therefore, it is implied that his past service will be taken into consideration when notice period is calculated. Remember, employment contracts are not assignable, so if a new employer assumes the place of the old, then a fresh employment contract will begin. The Court also added the cost of fuel to drive around and look for new employment. This was exceptional - Radwan was a sympathetic plaintiff, and the Court was looking for an excuse to give them more money.

Ratio	Successor corporations assume employment contracts of predecessor corporations unless they explicitly indicate to the employees that they will not honour past service - therefore, tenure is calculated from the date the employee was first hired by the previous corporation.

Employment Standards Code

- The Alberta Employment Standards Code will govern most employment relationships
- Federal Employment Code will apply to a small subset of employees in federally regulated industries
- Both set out minimum standards
    - Gives the option of paying termination pay or giving working notice (change from common law)
    - If the employee is employed for > 3 month and up to two years, you get a minimum of one week
    - IF the employee is employed for 2 years - 4 years, two weeks
    - 4-6 years = 4 weeks
    - 6-8 years = five weeks
    - 8-10 years = six weeks
    - 10+ years = eight weeks
- Wages include salary, paid commission and remuneration, but does not include overtime, vacation pay, holiday pay, bonuses or tips
- **Remember, these are just the minimums - DOES NOT release employer from common law notice requirements**
- NOT SUBJECT TO MITIGATION
- Also, not on top of the common law
- You CAN have employment contracts that set the Employment Standards Code periods as the maximums that will be provided, but you CANNOT contract for less
    - Requires very clear, very specific language (cannot simply say that notice will be calculated "based on the Employment Standards Code")
    - Also, if the contract provides a formula to calculate the notice period, it must ALWAYS provide for AT LEAST the statutory minimums - if not, then the entire clause is gone, and the common law will apply

Punitive Damages and Aggravated Damages

- Punitive damages require that the employer commit a separate, actionable wrong beyond the breach of contract
    - Specifically used to sanction particular instances of egregious conduct
    - ***DO need an independent actionable wrong, but this can include the breach of duty of good faith cited in aggravated damages***
    - Conduct must be egregious, malicious, over and above normal "bad behaviour"
- Aggravated damages refer to the modified Wallace test found in Honda v Keyes
    - No damages flow from the pain and suffering caused by the termination, unless the termination was conducted in a malicious or unfair way
        - Examples include: if termination was timed to particularly screw the employee out of another benefit they would otherwise be entitled to, disparaging the employee publicly during termination
        - Anything where the employer is not being truthful about the reasons for the termination (i.e. alleging serious misconduct when you know that no misconduct took place)
        - ***Essentially, it is implied that there is a duty of good faith owed to the employee in terms of how the termination is carried out***
    - These are separate, but related heads of damage
- ***Not subject to mitigation!***

Wallace v United Graingrowers (SCC 1997)

- Wallace v United Graingrowers is the leading SCC case
    - Court can increase notice period to recognize that egregious conduct will make it harder for the employee to find a new job

- i.e. if the termination unfairly tarnishes their reputation
- "Wallace bump" - if an employer terminates in a callous, highhanded and unduly insensitive manner, then you get a "bump" in the damages awarded

Honda Canada v Keays (ONSC 2005)	
Facts	Employee started working at Honda in 1986. Diagnosed with chronic fatigue syndrome in 1997, was off on disability for two years. Returned to work when long-term disability was denied by insurance company, which believed that he was not completely unemployable. Honda indicates that they will authorize employee's absences if the employee can provide doctor notes indicating that absences are related to condition, and giving some guidance as to how long he would be gone for. The employee misses a lot of work, does not always provide doctor notes. Honda thinks that he is faking his illness, sends him to see company physician. The employee's doctor says he needs a lot of rest, company physician indicates that he is capable of doing manual labour. Honda requests a meeting with employee, employee fails to show up, Honda terminates employment with cause for insubordination.
Issues	Did Honda have cause to fire the employee? Are punitive damages warranted?
Decision	At trial, judge found that employee was wrongfully terminated, awarded 15 +9 months in Wallace damages, plus $500k in punitive damages. Punitive damages were intended to "wake up a wealthy and powerful corporation to properly discharge their responsibility to accommodate a long term disabled employee." Court of Appeal later reduced the punitive damages to $100k. Court felt that Honda was inflexible and they fired the employee so that they wouldn't have to accommodate him further. The doctor-note system was very inflexible and difficult for the employee to always meet, and the employer's approach was overly confrontational. Honda assumed that, when the employee was denied long-term disability benefits by the insurer, the employee was "better" and could return to work without further accommodation. That is false. The test for short/long term disability is different from the test for disability requiring accommodation. In sum, three heads of damage: 1. Wrongful dismissal (Bardal factors) = 15 months 2. Wallace (aggravated) damages = 9 months 3. Punitive damages (at trial, $500k)
SCC	The SCC was horrified by the damages awarded by the trial court. The employer was not entitled to force the employee to go and see the company doctor. Don't accept that there was a conspiracy, or that he was being set up (which the trial court concluded). It appears that Honda was struggling to determine how to accommodate the serious illness that the employee had. Extending the notice period is no longer permissible. The starting point; there are ***NO DAMAGES associated with the pain and suffering associated with the loss of your job***. The only damages that flow are those that are derived from the failure to provide reasonable notice. But be reasonably anticipated from the perspective of whether the contract had been performed. There is an implied understanding in all employment contracts that the contract may end someday. What about "separate, independent actionable wrongs"? If the parties contemplate at the outset that, if it terminates in certain sets of circumstances causing emotional distress, then additional damages may apply if that situation comes to pass. Employers should be forthright with why the employee is being terminated. Therefore, the "manner" of dismissal is still relevant to the damages calculation (can also be an implied understanding). ***NO LONGER calculate damages on the basis of months added to notice period. Only assess it via a dollar***

	amount. HOWEVER, note that courts can still extend the notice period in certain circumstances. If the way that the employer fires the employee makes it significantly more difficult for the employee to find work, it is possible to extend the notice period. The question is - is the extension of the notice period arbitrary or specifically quantifiable?
Ratio	The test for short/long term disability is different than the test for disability requiring accommodation to the point of undue hardship. Punitive damages may be awarded where an employer behaves egregiously, and the Court wants to specifically sanction and punish that conduct.

Brito v Canac Kitchens (ONCA 2012)	
Facts	Employee had 24 years service with company, employer fires him without cause after the employee receives a cancer diagnosis, an gives him minimum he is entitled to under the Employment Standards Code (8 weeks). The original written employment contract called for "reasonable notice." The employer later admitted that the employee was likely entitled to more, but decided to proceed with a "low ball" termination payment. Essentially, the employer gave the employee less than they were legally entitled to, in the hope that the employee would not sue.
Issues	What is the appropriate notice period? What damages are owing?
Decision	The reasonable notice period in this case is 22 months. "Reasonable notice" in an employment contract should not be interpreted to mean the minimum entitlement under the Employment Standards Code will be followed - a full analysis of the circumstances is required to determine the appropriate range for a notice period (using the Bardal factors). The Court finds that Canac's behaviour in this case was "cavalier, harsh, malicious, outrageous and high handed." On that basis, the Court awarded an additional $15,000 in ancillary damages, and would have ordered punitive damages similar to Honda v Keyes, but that was not specifically pled. The fact that the termination occurred after the employee got a cancer diagnosis made the employer's conduct particularly egregious. The courts will use its powers to ensure that employees are not taken unfair advantage of in the employment relationship at termination. A big problem here is that the employee was permanently disabled as a result of the cancer, and he lost his short and long-term disability benefits. The Court indicated that the employer assumes the role of insurer during the notice period. This is because the employee would have had access to the benefits.
Ratio	Additional damages may be awarded if the employer deliberately low-balls notice periods when they know that the employee is likely entitled to more.

Piresferreira v Ayotte (ONCA 2010)	
Facts	Piresferreira (employee) worked for Bell as manager, launched a lawsuit for damages claiming mental suffering as a result of a series of conflicts with her former manager, Ayotte. She had good performance reviews, although room for improvement was noted in the most recent one. After she was shoved by Ayotte, she complained to Bell. Bell offered to let her receive a formal written apology from Ayotte. She declined to receive the apology. Bell gave Ayotte a disciplinary warning and required him to attend a conflict resolution course. The day after, Piresferreira went on long term sick leave, citing stress due to workplace harassment. She never returned to work, and later launched a lawsuit claiming negligent infliction of mental suffering, battery and assault. Since the incident, she was diagnosed with post traumatic stress disorder stemming from the incident, and was deemed by doctors to never be able to work again.

Issues	Are the torts made out? If so, what damages are owing?
Decision	At trial, the judge found that Ayotte and Bell were jointly and severally liable for negligent infliction of mental suffering, battery and assault. Also found that P was constructively dismissed, entitled to notice damages. Continued employment at Bell was impossible because Ayotte was still located in the same unit. Awarded $50k general damages, and $500k in lost wages to age 65, since she can never work again according to doctors. ONCA overturns the trial decision. ***No tort of negligent infliction of mental suffering is available in employment relationships.*** In applying the Anns/Cooper test, the Court found that there was a sufficiently proximate relationship between P and Bell to warrant a prima facie duty of care, but this is voided due to policy reasons. The Court found that the legislature is better suited to determining if this relationship should attract that type of tort liability. **Imposing a duty to protect employees from the variety of workplace incidents that may cause mental suffering too greatly expands the scope of liability for employers.** Instead, there is an implied term in employment contracts that they will be treated civilly and with respect. In this case, the employer breached that duty to Piresferreira. Note that damages here are calculated as of the date that Piresferreira filed a harassment complaint. That will be used for any situation where an employee files a complaint that isn't properly handled by the employer. Reduced award of damages to $45,000. Negligence has no place in the employment context - these actions will be dealt with as breaches of contract.
Ratio	Employers do not owe a duty to employees to prevent any situation from happening which might cause mental suffering.

Jones v Klassen (ABQB 2006)	
Facts	Klassen employed by Jones as investment advisor, signed an employment agreement with six-month non-solicitation and confidentiality clauses. Worked for three years, Klassen quit due to perceived limits placed on his work by Jones. Decided to instead begin working for a competitor. Prior to advising Jones of intention to quit, Klassen printed client list and contact list, 37% of clients left Jones with Klassen to the new company.
Issues	Did Klassen breach his employment contract? If so, what damages are warranted?
Decision	Klassen had contractual duties to Jones not to take information from Jones, not to use information from Jones in a manner adverse to Jones' interests, and to not solicit Jones' clients for six months after leaving employment. He also had common law duties to employer, including to not use confidential customer lists outside of scope of employment. Klassen also had fiduciary duty to Jones as the face of company, with the ability to exercise power over Jones' legal and practical interests. He competed unfairly with Jones, breached contract, breached common law and fiduciary duties. Damages assessed based on loss of accounts less ten percent market attrition loss, ten percent family and friends attrition loss (lost commissions calculated to be about $14,000). Punitive damages awarded against the employee because he deliberately lied to Jones when he photocopied the client list, and purportedly returned the original.
Ratio	Employees can also face punitive damages if they intentionally deceive their employer in the course of breaching the employment contract, common law duties, and/or fiduciary duties owed to the employer.

MITIGATION

- Regular notice period damages are subject to a duty to mitigate
  - Note that the statutory minimums set in the Employment Standards Code are NOT subject to mitigation
- Aggravated and punitive damages are not subject to mitigation
- Michaels v Red Deer College (SCC 1970) - the onus with respect to mitigation is entirely on the employer
  - The employer must prove that the employee has failed to mitigate their damages
  - Two parts to the test that the **employer** must prove:
    1. That there is work available that corresponds to the employee's skill set, salary expectations, experience, etc.
    2. That the employee did not take reasonable efforts to secure new work during the notice period.
- This is a fact specific endeavour - for geographic area, for example, it will depend on the employee's circumstances on whether they are required to move to another location to find similar work
- Also, employers may argue that the failure by the employee to continue to work during the notice period constitutes a failure to mitigate damages

Evans v Teamsters, Local 31 (SCC 2008)	
Facts	Evans was employed for over 21 years as business agent in Teamster union office. Dismissed without cause in 2003 after election of a new union executive. Incoming president faced employee's termination letter, later that day phone to "commence discussions." Evans' lawyer sent T a letter saying he was due 24 months' notice, which could take the form of 12 months working notice plus 12 months salary in lieu. Union sent message back saying they wanted Evans to serve out the entire 24 months, and if he didn't they would take that as just cause for termination without notice. Evans said he would continue to work only if the union rescinded the termination letter, union refused. Evans quit, union paid no severance based on position that he quit.
Issues	Was Evans required to accept the employer's offer to work for the entire notice period, or was refusal a failure to mitigate damages?
Decision	Employer is required to pay damages when employees are terminated without cause, but employees have a duty to mitigate those damages by seeking alternative income. In some cases, this may require the dismissed employee to mitigate his damages by returning to work for the same employer during the notice period. Employer must demonstrate: 1. That the employee has failed to make reasonable efforts to find work 2. That work could have been found IF the employer offers to allow the employee the opportunity to continue working during the notice period, the question then becomes ***whether a reasonable person would accept that opportunity.*** This is an objective, but contextual analysis. In this case, the employee was set to receive a similar salary, working conditions were similar and not demeaning, personal relationships are not an issue. **Therefore, it was not objectively unreasonable for Evans to return to work to mitigate damages. The fact that the dismissal period would only be for two years is not relevant to this analysis.** Also, the SCC confirms that it does not matter whether the employee was terminated constructively, or actually. The analysis for mitigation is the same, as the duty remains the same. The onus for proving the failure to mitigate rests squarely with the EMPLOYER.
Ratio	Employees have duty to mitigate damages when terminated without cause. This includes accepting work during the notice period from the employer, provided it would not be objectively unreasonable to do so.

Magnan v Brandt Tractor (ABQB 2007)

Facts	Magnan had 38 years of service with Brandt. He reached the company's mandatory retirement age in 2004, and was informed that he would be dismissed without severance as of December 31 of that year in compliance with the retirement policy. Magnan protested that he would not retire, but in November, Brandt announced that it had already hired his replacement. Brandt then claimed that Magnan had misrepresented his intentions by allowing a replacement employee to be hired and for accepting retirement gifts from the company. Also, note that Brandt had Magnan take the replacement employee to see all of his sales contacts to "hand the reins" over. Magnan claims that it is impossible for him to "return to work" because of this when Brandt offers him the chance to return. Note that, in SK, the SK Human Rights Act does not protect against age-based discrimination. Brandt Tractor was based in SK, but Magnan was employed in AB.
Issues	Did Magnan have a duty to mitigate damages by continuing to work for Brandt during the notice period?
Decision	Brandt Tractor is required to prove that Magnan did not take steps to search for work after constructive dismissal, and secondly, that he would have found work had he done so. Brandt submits that Magnan should have accepted the offer to return to work in a changed capacity. This is bollocks. The new working conditions were in a substantially different position, and it would not be tolerable for him to work under the supervision of his replacement.
Ratio	Employees are entitled to not return to work for part of the notice period if the detrimental changes are put into effect.

EMPLOYMENT STANDARDS CODE

- Applies to all employees in Alberta, unless they are excluded (essentially, employees covered by other pieces of legislation)
- Minimum standards will apply regardless of whether the employee is unionized
    - If the employer tries to contract for less than what is provided in the Code, then the ENTIRE CONTRACT will be void (Machtinger v HOJ Industries)
- Sections 3 and 4 - cannot contract out of the Code, where you enter into an employment agreement that provides better terms, the Code cannot be used to derogate from those terms
- Section 5 - sale of a part of a business, or if it continues to operate under a receiver, the employees that are transferred are deemed to have continuous employment
- Contains provisions that prevent employers from deducting from your wages without permission (i.e. cannot deduct for faulty workmanship, breaking items etc.). That is a performance issue, you cannot dock pay.
- Also deals with periods of rest between shifts, overtime provisions, statutory holidays, vacation time minimums
- For maternity week, cannot terminate the employee while they are on maternity leave, but you CAN fire a person who is about to go on maternity leave (note that this still may run afoul of the HRA)
    - They must be returned to a comparable position at no less compensation when they return
- **Note that certain sections that do NOT apply to certain industries**
    - If you work in the construction industry, for example, there are likely exemptions (See the regulations)
        - i.e. will often be exempt from termination pay
    - Domestic workers are exempt from hours of work and overtime provisions
    - Management or supervisory positions, members of the Law Society, and articling students are also exempt from Employment Standards Code
- You have six months under the Code to file a complaint for a violation (note that this is shorter than the Limitations Act)

Machtinger v HOJ Industries

- Where the employment contract is silent, the Employment Standards Code will imply that the minimum will apply

- However, where the employer tries to contract out of the minimums, the Court will award extra protections and damages
    - This is intended to encourage employers to not test the standards legislation and only get off with having to pay the minimums
    - IF the contract does not comply with the legislated minimums, common law provisions will apply

Re Alberta Employment Standards Code

- Employee was wrongfully terminated for cause, as was found by the adjudicator. The adjudicator awarded the statutory minimums. The employer argued that the employee mitigated within the minimum termination pay period.
    - The Court indicated that the minimums will apply regardless of mitigation efforts made by the employee. Therefore, if the minimum is two weeks, you get that two weeks regardless of whether you immediately find a job or not

Daneliuk v Ainsworth Technologies

- The employee was unsuccessful in making a claim under the Employment Standards Code. Instead tried to sue under the common law parts of her contract that fell outside of the employment agreement.
    - The Court found that the earlier adjudicator order is final and binding. There is no statutory right of appeal beyond that.
    - Employer argued that the adjudicator has already considered the issue, and the Court agreed (met the test of issue estoppel)
        - The same question had been decided
        - The decision was termed as being final
        - The parties were identical
            - Therefore, the employer is barred from litigating these issues in a separate proceeding after the adjudicator has rendered its decision
            - **You have to be careful when you select which forum you proceed with. If you proceed with an Employment Standards process, then the determination of the issue will be final and binding (cannot then go to the ABQB to argue the same case if you fail).**
                - However, if you are successful with the tribunal, you can take that to the courts for an assessment of common law damages.

Vrana v Procor Ltd

- IF employees are temporarily laid off as a company proceeds with restructuring, the company has the right to recall the employees within a sixty day timeframe while the employees are laid off
    - If the employee decides to not come back when recalled, then they are not entitled to termination pay
    - However, if the sixty day period passes with no recall, then the employee is entitled to severance
- Vrana sued for constructive dismissal before the sixty day period had passed
    - The trial judge determined that, although Vrana had been laid off, he was not constructively dismissed because the Employment Standards Code allowed for this type of temporary termination
    - The ABCA agreed with this, but indicated that the Code is remedial legislation that is intended to protect employees
        - This section of the Code is harsh for employees, and it can be invoked unilaterally by the employer
        - The employee is limited in job search process, life is economically and legally on hold
        - **Indicated that employers have a duty to inform employees of the particulars of this section of the Code if it is invoked by the employer (otherwise, the normal standards will apply)**
            - This at least allows employees to anticipate how long the temporary layoff will continue
        - In this case, since the employer did not provide proper notice, the minimum standards will apply

CANADA LABOUR CODE

- Applies to a list of federally regulated industries and businesses (i.e. Chartered Banks, shipping, railway, air transportation, work that is outside the exclusive legislative authority of the province such as First Nations)
    - The Labour Standards Program provides a list of all entities that are federally regulated, you can access this online or call them to determine status
- This is designed to be a more complete code than the provincial Employment Standards Code
- Section 168 is the equivalent of ss 3 and 4 of the ESC - cannot contract out of the minimum standards, and contracts that provide better benefits are enforceable and cannot be derogated from
- Section 182 - inspectors have the power to investigate whether employers are discriminating by violating equality of wage guarantees
- Only need to work for six months to access maternity and parental benefits

Unjust Dismissal Complaints

- Division 10 deals with individual terminations
    - You have to give two weeks' notice AND you have to pay termination pay (note that under the ESC, you get one or the other)
        - Provided you have worked for three months or more you get two weeks' notice, if you work for at least 12 months, you get both
    - IF you have worked for the employer for twelve months or more, and you are not management, then you can make an "unjust dismissal" complaint
        - In that case, the employer does not just pay severance, they must prove that the termination was just
        - The employee has 90 days to file one of these claims - important timeline to remember
        - Employers can prove that the termination was for discontinuance of function, the employer must prove that they are no longer in the business of doing that particular thing, and the employee was directly related to that function.
            - This is a narrow exception - if this is proven, then the employer does not need to prove the just standard
        - Will also apply for constructively dismissed employees
    - If you make an unjust dismissal complaint, it will first go to a conciliator
        - IF the matter is not resolved to the employee's satisfaction, they can ask for an adjudicator to be appointed, who will determine whether the dismissal is just or not
        - Reinstatement is the presumptive remedy, can also direct the employer to pay compensation for lost wages without reinstatement, and also have wide discretion to order other things in the interests of equity (i.e. clearing employment record, writing a letter of reference etc.)
            - Note that Canada Labour Code damages are NOT necessarily the same as Bardal damages - could be substantially more
        - Note that, under the ESC, all they can do is direct that the minimums be paid
            - The powers are more robust under the Canada Labour Code -
        - **The whole "unjust dismissal" regime is based on an assumption that employees should have a guarantee of continued employment**
            - ***Note that, you CAN be terminated JUSTLY but NOT FOR CAUSE***

CONFIDENTIAL INFORMATION AND NON-COMPETITION CLAUSES

Common Law Duties

- **Two common law duties:**
    - Cannot misuse confidential information (regardless of seniority)
    - Can be found to owe fiduciary duties (a key employee) - the primary restriction is on soliciting prior clients for a reasonable period of time after employment terminates
        - They ARE allowed to compete, they just cannot solicit past clients
        - The key point - is there vulnerability to the employer?

Restrictive Covenants

Non-solicitation covenants

- **Non-solicit** - similar to the common law duty, but set out in contract
    - Remember, even if the non-solicitation agreement is ultimately found to be invalid, the key employee will still owe the common law fiduciary duty, which may lead to the same outcome
    - Looking at scope of the restriction, and the length of time. IF the restriction and length of time is too onerous, the Court may overturn it.
    - Geography is a problem in the age of the internet - salespeople often do not have defined areas as they once did
        - Many covenants now simply state that its scope is restricted to the clients that the employee formerly did business with for a specified period of time

Non-competition covenants

- **Non-compete** - employee signs a contract agreeing to not work in the same industry against the former employer for a specified period of time
    - The Courts do not like non-competes, it must be reasonable in scope, time and geography. If it is missing any of those three, then the entire clause can be defeated.
    - There is a big difference between a non-compete in an employment contract and a non-compete in the sale of a professional business
        - For employment contracts, non-competes are prima facie unenforceable, and will be heavily scrutinized
            - The only way the employer can enforce the contract is if they prove that it would be impossible to protect their interests in the absence of the non-competition agreement
            - Must be reasonable in terms of SCOPE, TIME, and GEOGRAPHY (if unreasonable on any of the three factors, then the entire non-compete is unenforceable)
            - Employee can argue that the agreement should not be enforceable from a public policy perspective.
            - If the contract is too ambiguous, then the clause will be struck down
        - For sales of businesses that include non-competes, they are presumed to be enforceable, because it is presumed that the consideration of the sale is partially based on the purchase of the non-compete (Shafron)

Interim Injunctions

- **Interim Injunctions** - this is what you seek as an employer if an employee breaches either common law or contractual duties
    1. Need to show that a serious issue is being tried (strong prima facie case, the employer is likely to win)
    2. Irreparable harm would result if the injunction is not granted (usually something that is not compesible with money)
        - **If the contract is strong and clear, then irreparable harm will be assumed if the case, prima facie, is an obvious violation**
    3. Balance of convenience indicates that the interim injunction should be allowed.
- **These are filed BEFORE trial, and after the statement of claim is filed.**
    - You file a notice of motion or application with Chambers judge
    - Supported with affidavit evidence setting out the reason why you are seeking the interim injunction
    - Also requires an undertaking to pay damages (the plaintiff undertakes to the court that, if they go all the way to trial and the trial judge indicates that they don't think the injunction should ever have been granted, then the plaintiff must pay damages for wrongfully bringing an interim injunction application)

Anderson, Smyth & Kelly Ltd v World Wide Customs Brokers (ABCA 1996)	
Facts	Both parties are customs brokers. Kelly commenced employment in 1980, and in 1985 he became a director, officer, and minority shareholder and was placed in charge of the Edmonton office. In 1989, he quit his position and immediately took up a position with a direct competitor. Also approached and solicited past clients. There was no written non-compete clause in the contract, but Anderson is claiming that Kelly breached a fiduciary duty and confidentiality obligations by sharing client info with new employer. Seek damages for loss of past and future profits, loss of goodwill and punitive damages.
Issues	Did Kelly breach his fiduciary duty as a past manager and director by taking up employment with a direct comeptitor and soliciting past clients?
Decision	Kelly, as a director, senior officer, and key employee owed fiduciary duties to the employer. He was in a position of trust, and had the power to affect the economic interests of his former employer. This is the kind of relationship that equity can intervene in to protect the weaker party from breaches in the fiduciary duties owed to it. **Where the employee owed a fiduciary duty to the employer, then direct solicitation of the former employer's clients by the departing employee is not acceptable.** **1.** Employee has the power to exercise discretion **2.** That discretion can be exercised in a way that affects the employer's interests. **3.** The employer is at the mercy of the employee in the exercise of that power. Also, the new employer will be held liable if they knowingly assist the past employee with breaching the fiduciary duties they owe to their former employer. In this case, World Wide had actual knowledge of the employee's conduct, and it accepted the benefit of the breach of fiduciary duty. Therefore, it also owes damages. Overall, the non-compete should have been in force for one year following termination. Damages are calculated based on loss of profits. Both Kelly and World Wide and jointly and severally liable.
Ratio	Key employees who have the capacity to singularly effect the economic interests of their employer may owe the employer fiduciary duties. In that case, a period of non-solicitation of former clients will apply.

Jones v Klassen (ABQB 2006)	
Facts	Klassen employed by Jones as investment advisor, signed an employment agreement with six-month non-solicitation and confidentiality clauses. Worked for three years, Klassen quit due to perceived limits placed on his work by Jones. Decided to instead begin working for a competitor. Prior to advising Jones of intention to quit, Klassen printed client list and contact list, 37% of clients left Jones with Klassen to the new company.
Issues	Did Klassen breach his employment contract? If so, what damages are warranted?
Decision	Klassen had contractual duties to Jones not to take information from Jones, not to use information from Jones in a manner adverse to Jones' interests, and to not solicit Jones' clients for six months after leaving employment. He also had common law duties to employer, including to not use confidential customer lists outside of scope of employment. Klassen also had fiduciary duty to Jones as the face of company, with the ability to exercise power over Jones' legal and practical interests. He competed unfairly with Jones, breached contract, breached common law and fiduciary duties. Damages assessed based on loss of accounts less ten percent market attrition loss, ten percent family and friends attrition loss (lost commissions calculated to be about $14,000). Punitive damages awarded against the employee because he deliberately lied to Jones when he photocopied the client list, and purportedly returned the original.

Ratio	Employees can also face punitive damages if they intentionally deceive their employer in the course of breaching the employment contract, common law duties, and/or fiduciary duties owed to the employer.

RBC Dominion Securities v Merrill Lynch Canada (SCC 2008)	
Facts	RBC and Merrill Lynch owned competing offices in BC. In November 2000, all but two investment advisors left RBC without notice to join Merrill. Prior to departure, many Ias expressed dissatisfaction with RBC and were concerned with compensation. Merrill's manager recruited these employees directly, and worked with a manager at RBC to facilitate the transfer (he also came over). Also, IAS brought client records from RBC to Merrill. At trial, the judge held that, in the securities exchange market, employers often engage in competitive hiring to try to lure employees away from other firms. The average "competitive recruit" tends to bring up to 75% of former business with them.
Issues	Do the investment advisors, the managers at RBC and Merrill owe fiduciary duties to RBC? Were these duties breached?
Decision	For the investment advisors, they were not in a sufficiently high position of trust and influence to imply fiduciary duties. Therefore, it is not possible to "read in" a term of the employment contract to the effect that they will not compete with their former employer. Since this was not included in their employment contracts, they do not owe any duty to RBC to not move over to a competitor. For the manager at RBC that orchestrated the mass exodus to Merrill, he also was not in a sufficiently senior position to imply that he owed a fiduciary duty to RBC. In the absence of any non-competition clause in his contract or fiduciary relationship, the manager was free to leave RBC at any time and discuss his intentions with his co-workers. Introducing an impediment to employees moving to other companies by means of a new "quasi-fiduciary" category for lower-level employees will create a chilling effect on the mobility of have legitimately been under the impression that they do not owe a non-compete duty to their former employers.
Ratio	In the absence of an express term that introduces a non-competition clause, lower level employees that do not owe fiduciary duties to their employers are free to leave employment and work immediately for a competitor during the notice period.

Shafron v KRG Insurance Brokers (SCC 2009)	
Facts	Shafron originally owned his own insurance agency, which he later sold to KRG and became a senior manager for them. He later signed a non-competition covenant with KRG, promising to not compete within the "Metropolitan City of Vancouver." He later quit and began working for a competitor, taking many clients. The non-compete clause indicated that he could not compete for three years, the scope was any employment or affiliation with an insurance brokerage.
Issues	Did Shafron breach his non-competition agreement with KRG?
Decision	There is no such thing as the "Metropolitan City of Vancouver." The Court of Appeal held that this should be interpreted to mean Vancouver, UBC, Burnaby and Richmond. The Court essentially said that it could "fix" the ambiguous contractual term by incorporating a clear definition to set the geographical scope. This is what was under appeal - can courts "read in" clear definitions to contractual provisions that are, on their face, ambiguous.

	Notional Severance: "I know that the contract says X, but we know that they meant Y." Blue pencil severance: The court actually rewrites the contract to portions that are invalid, and replacing them with provisions that are. The SCC struck down that malarky, saying that it is not up to the courts to assist the employer in rewriting the geographical scope of non-compete agreements that are drafted vaguely. Notional severance is not permitted, blue pencil is only allowed to cure technical defects, not to redefine the contract's scope. The Court also said that "Russian doll" or "ladder" styles of employment contracts will not be enforceable. These clauses start with a wide geographic region, then say that if that is not enforceable, then it will apply to a smaller region, and if that is not enforceable… so on and so forth. The scope of the geographic area must be definable based on a reasonable reading of the contract. **The rationale for this decision - allowing courts to rewrite or reinterpret the contract to "fix" it encourages employers to draft overly broad contracts, and wait for the courts to reinterpret it later, if it actually goes to trial (which it rarely does).**
Ratio	Russian doll style clauses defining the geographic scope of non-compete agreements will not be enforced by the courts.

KOS Oilfield Transportation v Mitchell

- This was an ex parte application for an injunction - KOS Oilfield managed to get a very onerous interim injunction against three former employees that had left the company and went to a competitor, including the previous principal of KOS Oilfield, Art Kos
- KOS Oilfield had previously been sold to Saputo, and part of the sales contract included a non-compete clause for Art Kos (4 year NCA)
    - Therefore presumed to be enforceable, since it is included within the sale of the business
    - The agreement was set to expire on January 1, 2010
    - Art Kos and other former employees started ATK Transport
    - Some of the other employees that went over to ATK took pictures of materials owned by KOS while they were still employees of KOS (also sent incriminating text messages to Art Kos that basically incriminated them)
- KOS Oilfield files an injunction application that prevented all of the former KOS employees from competing and using confidential information for improper purposes (i.e. helping ATK set up business)
    - Prevents them from soliciting clients as well, from interfering with KOS Oilfields' contractual relationships with employees, suppliers, and customers, and orders the former employees to provide all emails that they had sent to each other over the last year. Also indicated that they could not appeal the order until they comply with the disclosure requirement.
- As it turns out, the employment contracts that the employees signed did not actually contain non-compete provisions (only contained onerous non-solicitation agreements)
    - Went to get a stay of the injunction order (test is same as to get an injunction), the chambers judge denied it
    - Goes to the ABCA
- **ABCA decision:**
    - The injunction against the employees completing cannot be sustained because their employment contracts did not have non-compete clauses
    - Also, the non-solicitation agreements did not contain any geographic scope or time limitation, therefore they are unlikely to be upheld
    - Appellants were entitled to take employment elsewhere, subject to fiduciary obligations and obligations related to confidential information
    - Also, Mitchell (the administrative assistant) was not a fiduciary by nature of the more junior position she held, therefore she was not bound by any contractual or fiduciary obligations
        - **Dependency and vulnerability are indispensable aspects**

- **THEREFORE, KOS Oilfield cannot sustain the injunction. Damages are awarded in favour of the former employees for having an improper injunction awarded against them.**

Brett Young Seeds Ltd v Dyck

- Contains an excellent summary of the test for injunctions
- Proprietary on confidential information: information about important aspects of the business of a former employer that are not known to the public, and if known by the public, would harm the competitive position of the employer
- Brett Young tries to obtain an injunction based on a clearly unenforceable non-compete provision
  - One year employment contract that the employer and employee did not agree to extend
  - The contract included a non-compete provision that would last for 18 months, could not sell the same products in a given territory
  - Also included an 18 month non-solicit
- First, the Court notes that the non-compete cannot be enforced because the contract ended naturally, it was not terminated prematurely
- They are also fairly low level employees - they could not meet the dependency and vulnerability test to have fiduciary obligations imposed on them
- Looks at whether the non-solicitation agreement is adequate to protect the interests of the company, if not, you look at the reasonableness of the non-compete agreement
- Also, the fact that it took Brett Young three months to bring the application shows that they are not suffering irreparable harm - these applications must be filed quickly

Evans v SportsCorp

- SportsCorp is suing Evans for violating a non-compete agreement. Evans is a sports agent, represented NHL players, took a bunch of NHL players with him when he left SportsCorp.
  - The clause is more of a non-solicitation agreement - could not approach or contract with any players signed to SportsCorp for a period of 24 months, applies to anyone who has been a client of company, whether Evans worked with them or not while employed with SportsCorp
  - Evans went and hired the main recruiter for SportsCorp in the Czech Republic, and that person then signed a bunch of Czech players to Evans (so Evans did not directly solicit these clients, per se)
- The ABCA finds that the employees that Evans hired were soliciting clients of SportsCorp on his behalf
  - The question then becomes whether that is improper
    - The non-solicitation agreement contains the words "any client of the company which has been a client of the company"
    - The ABCA concludes that they are not satisfied that this can be readily interpreted, its reach is undeterminable (Evans only knows the people he did business with, he does not know who the other clients of the company might be)
      - This restriction is therefore more than what SportsCorp actually needs to protect its interests
    - However, they look at whether he was a fiduciary through the common law
      - YES, he had specific knowledge of how the company acquired Czech clients, and there is a high element of vulnerability relative to the corporation (key employee that exercises discretion outside of the oversight of SportsCorp)
      - As a fiduciary, you are not allowed to have your self interest collide with the interest of the employer for a reasonable period of time
      - Former clients can come to you on their own initiative, but you cannot take actions to solicit them
      - In some professions (lawyers) the former employer (The firm) must inform clients that a lawyer is leaving (this is in the Code of Conduct)
      - Clients that are brought in via general advertising after an employee leaves are fine (provided the advertising was, in fact, general)

HUMAN RIGHTS AND DISCRIMINATION

- Essentially, this legislation prevents employers from discriminating on enumerated bases in the employment context
- Sexual orientation is included in the Alberta Human Rights Act (from the Vriend decision)
- Drug and alcohol addictions are protected under the Human Rights Act
    - Alberta has a unique approach - safety-focused, way more latitude for drug and alcohol testing in Alberta than in other provinces
        - Note that the ABCA has specifically singled out ONCA decisions and have said that they are NOT following the precedents set there in this context
- Family status is also protected
    - When first enacted, it was interpreted to mean that you cannot fire an employee for the wrongs done by other family members
    - Also aimed at anti-nepotism policies
    - Today, it also mean childcare
        - If you have a need for childcare that you otherwise cannot address yourself, the employer must accommodate your work schedule to work around your childcare needs
- The Human Rights Act is considered to be quasi-constitutional (cannot be amended using normal legislative procedures)
    - Also, between the various grounds, there is no ranking system - all grounds are considered to be equal
        - Makes it difficult in practice if the choice comes down to protecting one right and not another
    - **Overall goal is to get as many people to work as much as they can without regards to race, family status, religion, disability, age etc.**
- "Accommodation" is at the core of human rights legislation
    - The claimant must show that they fall within one of the protected grounds
    - The accommodation must be reasonable, which is to say it does not need to be perfect
- If accommodation is not possible, the employer must claim a **"bona fide operational requirement"** (BFOR) that means that they cannot change what they are doing to properly accommodate (essentially, pay damages instead) **- this is the employer's defense to a discrimination claim**
    - Three hurdles that must be surmounted:
        - Employer must prove that the standard the employer is refusing to change is rationally connected to the performance of the job (i.e. pilots need to see, so it is OK to not hire blind pilots)
        - Employer must adopt the standard in good faith, and it was not intended to discriminate
        - Standard is reasonably necessary, employee cannot be accommodated without imposing undue hardship on the employer.

Human Rights Tribunal Process

- Alberta HRC has jurisduction over provincially regulated employers (i.e. does not include federally regulated entites, such as banks, RCMP, federal employees working in Alberta etc.)
- Have one year to file a complaint, can be extended in exceptional circumstances
- The Commission serves the Respondent directly, the Respondent has 30 days to respond directly to the commission\
- "Conciliation" happens after that, after which a conciliator (employed by HRC) discusses the dispute with the two parties and tries to get them to speak with each other and resolve the situation themselves
    - Conciliator does not investigate or make any determinations of fact
- If conciliation does not resolve the conflict, an Invesigator will be appointed to look into the matter, provides a written report on whether the complaint has merit or not
    - The Director of the Commission then makes a decision on whether to proceed
    - **Note that, the parties can request that the Director make a determination on whether to proceed earlier if attempts have already been made to resolve it outside the formal process**

- If the director decides that the complaint has merit, then the tribunal's in-house legal counsel will prosecute the complaint on the complainant's behalf
    - The complainant still has independent status in front of the commission, and can have independent legal counsel if they wish
- If the Director has decided to not proceed, then the complainant has the right to appeal that decision to the Chief of the Tribunal
    - If the Chief rejects the appeal, then the complainant has six months to file for judicial review
- The parties can also apply for a Tribune Dispute Resolution process outside of the formal adversarial process
    - Staffed by actual tribunes, tries to get the parties to work towards an amicable settlement
- The actual hearing is more informal than a regular court
    - Witness can be called, must be sworn, opening/closing statements can be given
    - Tribunal has power to compel attendance and testimony via subpoena
    - Not tied strictly to the rules of evidence, although they are generally followed
- Tribunal is required to give a written decision
    - Can order injunctions, like a regular court
    - Can order consultants to engage in sensitivity training in a problematic workplace (beyond what a court can order)
    - Can order that the respondent employer makes opportunities available to the complainant that were previously denied to them (i.e. if the employee was not hired for a job on a discriminatory basis)
        - Note that reinstatement is not a remedy under the common law, and cannot be given in courts, but CAN be given by the HRC
        - Can give back pay for an indefinite period if reinstated retroactively to date of improper dismissal
- Parties have a statutory right of appeal to the Court of Queen's Bench (not an appeal de novo, deference is shown to the tribunal)
    - Only have 30 days to appeal the decision

"Meiorin" test for Discrimination

- The decision in Meiorin changed the test for discriminatory treatment under provincial human rights legislation
    - Now a two part test:
        1. The employee must prove that the practice, rule or provision is prima facie discriminatory on an enumerated or analogous ground.
            1. The complainant must possess a characteristic protected from discrimination by the Act.
            2. The complainant must show adverse action or impact against her in the area of employment.
            3. The complainant must show that the protected characteristic was a factor in the adverse action or impact.
        2. The onus then shifts to the employer to demonstrate that the discriminatory standard is necessary as a bona fide occupational requirement. This is a very high standard to meet (basically, it would be impossible to do the job properly without the standard being in place).
            1. The employer must first show that they adopted the standard for a purpose that is rationally connected to the performance of the job
            2. Then, the employer must show that they adopted the standard honestly and in good faith that it was necessary to the fulfillment of that legitimate work-related purpose.

Alberta Human Rights Act, s 7(1)

Discrimination re employment practices

7**(1)** No employer shall

(a) refuse to employ or refuse to continue to employ any person, or

(b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.
(2) Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.
(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

British Columbia (Public Service Employee Relations Commission) v BCGSEU (SCC 1999)	
Facts	Meiorin was hired as a forest firefighter by BC government. Lost her job three years later after government introduced mandatory fitness tests that she was not able to pass. Meiorin claims that she was discriminated against in her termination.
Issues	Was Meiorin's termination discriminatory and improper? Are the new fitness requirements themselves discriminatory?
Decision	Employers seeking to maintain safety may err on the side of caution and set higher standards than are necessary for safe performance of the work. However, if men and women do not have an equal ability to meet the higher standard, the effect may be to exclude qualified female candidates from employment for no reason but their gender. The test for determining whether a particular employment standard is discriminatory should be changed to a two-step analysis: (1) the employee must show that the standard is prima facie discriminatory, (2) the onus then shifts to the employer to prove that the discriminatory standard can be justified as a bona fide occupational requirement. In this case, Ms. Meiorin has discharged the burden of establishing that, prima facie, the new aerobic standard discriminates against her as a woman. The evidence shows that women will have a much more difficult time passing the new standards than men. Also, Ms. Meiorin was performing her job adequately up to her termination date, so the standard is arguably higher than is required to do the job properly. As for the BFOR analysis, the government has shown that the standard was put into place to identify employees or applicants who are able to perform the job of forest firefighter safely and efficiently. All indications are that the government acted honestly and in good faith that adopting this standard was necessary to maintain safety and efficiency. However, the government must also demonstrate that the standard is reasonably necessary for the accomplishment of the legitimate work-related purpose. It must be demonstrated that it is IMPOSSIBLE to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer. In this case, the government has NOT shown that the standards are reasonably necessary to ensure safety and efficiency. Indeed, the claimant herself worked adequately in her job prior to termination, so the standards are clearly higher than necessary. Therefore, the government cannot establish that the requirement meets the BFOR test.

Ratio	1. The employee must prove that the practice, rule or provision is prima facie discriminatory on an enumerated or analogous ground
	2. The onus then shifts to the employer to demonstrate that the discriminatory standard is necessary as a bona fide occupational requirement. This is a very high standard to meet (basically, it would be impossible to do the job properly without the standard being in place).
	    1. The employer must first show that they adopted the standard for a purpose that is rationally connected to the performance of the job
	    2. Then, the employer must show that they adopted the standard honestly and in good faith that it

	was necessary to the fulfillment of that legitimate work-related purpose.

Extent of Duty to Accommodate

Hydro Quebec v Syndicat des employees de techniques professionelles (SCC 2008)	
Facts	Employee at Hydro Quebec had a number of physical and mental problems. Record of absences showed her missing 960 days of work from 1994 to 2001. Employer adjusted working conditions over the years to accommodate limitations. Psychiatric assessment indicated that employee should stop working, and there is no reasonable possibility of her being able to return to work on a continuous basis. Hydro Quebec terminated her on the basis of undue hardship.
Issues	Has Hydro Quebec met the test proving undue hardship?
Decision	The test for undue hardship is not whether it is impossible for the employer to accommodate the employee's characteristics. The test can be met if the employer shows that it would cause them undue hardship to continue accommodating an employee. The test is also NOT total unfitness for work in the foreseeable future. The test can be met if the employee's illness prevents them from satsifying the basic obligations of the job for the foreseeable future. In this case, all of the aspects of the test are met.
Ratio	The test for undue hardship can be met under the BFOR analysis if the employer would experience continued undue hardship if they were forced to continue accommodating the employee's disabilities for the foreseeable future.

Family Status and Childcare Responsibilities

CNR v Seeley (FCA 2014)	
Facts	Ms. Seeley requested accommodation on the basis of her childcare responsibilities after her employer, CNR, requested that she temporarily relocate from Alberta to Vancouver to cover a staff shortage. She was not able to arrange adequate childcare during her absence. She therefore requested either assistance in finding childcare, or exemption from being required to temporarily relocate. CNR granted her an extension of time, but eventually terminated her when she failed to relocate. Seeley alleged that CNR discriminated against her on the basis of family status.
Issues	Can an employer be liable for discrimination on the basis of family status if they fail to properly accommodate childcare issues?
Decision	The Court interpreted "family status" broadly to include childcare obligations (family status is an enumerated ground under the Canadian Human Rights Act). A four part test must be met to find discrimination on the basis of childcare responsibilities: 1. Child is under the employee's care or supervision. 2. Childcare obligation engages the individual's legal responsibility for that child (as opposed to personal choice). 3. Complainant made reasonable efforts to meet the childcare obligation through reasonable alternative solutions. 4. Workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfilment of the childcare obligation.

	In this case, Seeley had a legal obligation to care for her children through the Family Law Act, she made reasonable efforts to find childcare. CN was completely insensitive to her problem, and was inflexible, even though there were many reasonable ways to accommodate the situation.
Ratio	Four part test must be met for discrimination on the basis of failing to accommodate childcare responsibilities to be proven.

Disability and Drug Use

Alberta (HRC) v Kellogg Brown & Root Co (ABCA 2007)	
Facts	KBR is a construction company in Fort McMurray, working in oilsands. KBR required all prospective employees to first pass a drug test before being hired. The employment contract stipulated that it was contingent on passing the drug test. Employee smoked marijuana a week before taking the pre-employment drug test, and therefore failed the test. He was terminated immediately. Employee filed complaint with HRC alleging discrimination on the basis of disability.
Issues	Was the employee discriminated against on the basis of disability due to failing a drug test?
Decision	No evidence supports the inference that the employee is actually a drug addict - he was a recreational user of cannabis. However, the policy treats anyone who tests positive for cannabis as if they were actually disabled. There is evidence that supports the employer's BFOR contention - the effects of cannabis use can linger in a person's system for days, and these effects do compromise the ability of employees to conduct operations safely. Also, note that the Alberta HRA prohibits certain, but not all, treatment based on human characteristics as discriminatory. In this case, KBR's policy does not perceive the employee as being an addict, it perceives drug users as being a safety risk in a dangerous workplace. This is a reasonable conclusion to draw, and it is NOT discriminatory. Also, the complaint in this case was not made on behalf of all employees subject to the drug testing requirement. It was only made on the complainant's own behalf. Therefore, any conclusions regarding the policy's general scope is beyond the scope of the pleadings, and cannot be decided on. ***Note that the ABCA intentionally does not follow the line of reasoning from ONCA. Alberta is unique in how it treats drug tests.***
Ratio	Employers can test employees working in highly dangerous occupations for drug use as a condition of employment, and that does not count as discriminatory (in Alberta).

Lockerbie & Hole Industrial v Alberta (HRC) (ABCA 2011)	
Facts	Luka was a long-term employee of Lockerbie. Lockerbie subcontracted to Syncrude, and Syncrude had a policy that contractors could not work on their sites unless they first pass a drug test. Luka failed the drug test, and was therefore terminated by Lockerbie. Luka is suing both Syncrude and Lockerbie for wrongful termination and discrimination.
Issues	Can Syncrude be sued as "an employer"? Is Syncrude liable for discrimination for terminating Luka's employment?

Decision	Syncrude is not Luka's employer. Even though it sets the site rules, including the drug testing requirement, Lockerbie was at all times the company that directed Luka's work, set performance requirements, and paid him. Several indicia must be considered to determine if a company can properly be considered "an employer" for the purpose of applying human rights legislation: • Is there another more obvious employer involved • The source of the employee's remuneration, and where the financial burden falls • Employment agreements, collective agreements, payroll deductions, T4 slips • Who directs and controls the employee • Who has the power to hire, fire, and discipline the employee • Who has the direct benefit of or utilizes the employee's services • The extent to which the employee is part of the employer's organization • The perceptions of the parties as to who was the employer • Whether the arrangement has deliberately been structured to avoid statutory responsibilities.
Ratio	Must look at the indicia of employment to determine if a company can properly be considered "an employer" according to the HRC.

CEPUC Local 30 v Irving Pulp & Paper (SCC 2013)

Facts	Union is challenging a mandatory drug and alcohol testing policy used by Irving that was unilaterally implemented at a paper mill. Under the policy, 10% of employees in safety sensitive positions were to be randomly selected for unannounced breathalyzer testing over the course of a year. A positive test could result in disciplinary action leading to dismissal.
Issues	Is Irving's mandatory drug testing policy discriminatory?
Decision	A unilaterally imposed policy of mandatory random testing for employees in a dangerous workplace has been overwhelmingly rejected by arbitrators as an unjustified affront to the dignity and privacy of employees ***unless there is evidence of a general problem with substance abuse in the workplace.*** In this case, there is no evidence of widespread substance abuse problems, so the safety gains realized are uncertain or minimal. On the other hand, it is a significant violation of employee privacy rights.
Ratio	Mandatory random substance abuse testing will violate human rights standards unless it can be shown that there is evidence of a general and widespread problem with substance abuse in the given workplace.

Stewart v Elk Valley Coal Corp (ABCA 2015)

Facts	Stewart was employed at Elk Valley Coal Corp, which had an alcohol and drug policy providing that employees "with a dependency or addiction" could proactively seek rehabilitation without fear of disciplinary consequences. If they did not disclose, and had an accident due to impairment, then they could be disciplined or terminated. Stewart was advised of this policy and signed a form understanding and agreeing with it. He later hit a stationary vehicle with his loader truck. He tested positive for cocaine after the accident, but he told Elk Valley that he did not believe he was an addict. Elk Valley fired him for violating the policy, but he was told he could return after 6 months if he completed a drug rehabilitation program and agreed to a drug-free lifestyle. Stewart says this is discrimination on the basis of disability.
Issues	Does Elk Valley's drug testing policy discriminate against Stewart on the basis of disability?
Decision	Stewart clearly met the first two tests: he was disabled as a result of his drug dependency, and he suffered adverse treatment from his employer as a direct result of that disability (termination). In this case, the policy itself is not discriminatory since it applies to employees that are both addicted to the point of disability, and those who are not. The court finds that Stewart is able to control his drug use, knew about

	the policy, agreed to follow it, and then failed to do so. Some evidence shows that Stewart made attempts to conceal his drug use. Also, the policy adequately provides workers with a "second chance" if they fail to abide by the policy, and encourages pro-active disclosure by providing access to rehabilitative services. The BFOR analysis is not required since Stewart failed to meet the evidentiary burden under step 1.
Ratio	Policies regarding drug use that apply equally to all employees, and show sensitivity by providing rehabilitative services to those who proactively disclose problems, are not discriminatory.

Age Discrimination

Cowling v Alberta (Employment and Immigration) (AHRC 2012)	
Facts	Cowling was a 67-year-old employee terminated by the Province of Alberta when her most recent one year contract was not renewed. She worked for the province for several years, as a result of a number of successive contracts. The Province replaced the contract position with a permanent (but lower level) permanent position, which she was unsuccessful in obtaining. Cowling is arguing that the province did not hire her purely due to her age, as she otherwise was completely qualified for the job (and had been doing it on a contract basis for years).
Issues	Did the Province discriminate against Cowling on the basis of age?
Decision	Succession plans that are designed purely to squeeze out older workers and put younger workers in their place will violate the HRA. In this case, Cowling was an older woman and there was clearly a refusal to continue employing her. It is reasonable to infer that age was a factor in denying her continued employment, given the circumstances of the restructuring of the branch. She had otherwise done well in her job, so it is reasonable to infer that performance was not an issue in making this decision. The government argues that that Cowling was not a good fit for the position because it required hands-on mediation skills that she did not have the skills or potential to be a mediator. They also argue that the government has the power to replace a position at will according to organizational needs, and this does not indicate discrimination. The Province argued that they needed to replace the contractual position with a "growth" position and hire someone with more "development potential." Relevant documents describing the restructuring note that the older age profile of management is problematic. The Court finds the government's argument unconvincing. While governments are free to restructure offices, they cannot without legal justification deny continued employment either in whole or in part on the basis of age. Remedy: reinstated in a one year contract, given back pay for five years of contracts that were denied to her, plus general damages of $15,000. Also ordered that, if the contract is renewed in the future, Cowling's age must not be a factor in determining whether to renew.
Ratio	Succession plans that are designed purely to squeeze out older workers and put younger workers in their place will violate the HRA.

PRIVACY

- Comes up frequently - employees disclose a significant amount of personal information to employer during term of employment

- Employers have obligation to not misuse personal information about employees, and to safeguard this information from improper external disclosure
- A new tort of intrusion on seclusion was developed by the SCC in Jones v Tsige, and applies to the employment law context
    - This tort analysis is independent of statutory regimes that affect private information held by employers
    - Affects employers in two ways - must protect private information from unauthorized individuals from accessing, and also must supervise and scrutinize how employees use confidential information that they are privy to (should be clearly communicated to employees that misuse of private information is a firing offence)

Legislation

- Five important pieces of legislation
    - Privacy Act (federal legislation)
        - Applies to the federal government as an employer
    - Personal Information Protection of Electronic Documents Act (PIPEDA)
        - Federally regulated private sector employers
        - Alberta created its own privacy legislation that is substantially compliant with PIPEDA, which applies to Alberta-regulated employees (that is, most of them)
    - PIPA - Personal Information Protection Act
        - This is the one that is substantially similar to PIPEDA
        - Most privacy questions will fall under this Act, since the majority of employees in Alberta are subject to this
    - FOIPP - Freedom of Information and Protection of Privacy Act
        - This is how provincially regulated bodies handle personal information, and access to information requests
    - Health Information Act (provincial)
        - Applies to health information that is handled by health care service providers
        - Somewhat unlikely to apply in the employment context, unless you are a health care employer (ensuring employee compliance), and it prevents healthcare providers from giving information about employee health directly to the employer

Jones v Tsige (SCC 2012)

Facts:

- Two employees worked in a bank together. Tsige ends up in a common law relationship with Jones' ex-husband (who also worked at the bank). Ex-husband argues that he cannot pay child support. Tsige looked up his information using employee access to employer records to verify if this is true, found out it wasn't.

Analysis:

1. **History and Policy** - In Jones v Tsige, judge looked at history of tort of invasion of privacy, and looked at how changes in technology have made this tort more relevant in the modern era. Historically protected interests - right to be let alone, inviolability of the person, inviolability of personality. Trespass torts, defamation, breach of confidence actions all tangentially related to privacy concerns.
2. **Framework for analysis** - Used Prosser's four privacy torts from American courts (see case summary below)
3. **Case Law** - looked at unsuccessful applications to strike in Ontario where judges are not saying that the tort does not exist. Already recognition of tort of misappropriation of one's personality and image in Ontario and other Canadian jurisdictions. Extension of nuisance law to include case of harassing people over the phone.
4. **Charter values** - Tort law is not bound by the Charter, but the Charter is highly persuasive. Charter values protect privacy - personal, territorial and informational privacy (in context of criminal investigations).
5. **Legislation** -
    - FOIPOPA protects personal information *collected by public bodies*. Governs access to, collection, sharing, correction of information. Applies to governments and government agencies unless another enactment

says otherwise. FOIP commissioner oversees government's handling of information and information requests. Offences prescribed for breach.
    - PIPPA - protects personal information collected by private organizations. Governs collection, use and disclosure of personal information. Applies to corporations and business organizations, trade unions. There is a right of individuals to have personal information protected versus need of organizations to collect, use or disclose personal information for purposes that are reasonable. The Privacy Commissioner only has the power to declare that there has been a breach, but cannot dictate remedies.
6. **Law in Other Jurisdictions** - US law covers all four privacy torts. Commonwealth denied privacy tort for a long time, but now recognized in UK, AUS, and NZ.

Concluded that the facts above warranted creation of new tort.

Elements of new Tort of Intrusion Upon Seclusion:

1. Intentional - i.e. deliberate or reckless
2. Wrongful (unauthorized) intrusion upon plaintiff's private affairs or concerns
    a. Plaintiff must prove that defendant did not have authority to look at information
    b. Intrusion is physical or otherwise
3. A reasonable person would find the invasion highly offensive
    a. It would cause a reasonable person distress, humiliation or anguish.

    ***Harm* does not have to be proven.**

Damages:

- Compensatory damages taking into account nature, frequency, and occasion of the intrusion. Impact on health, wellbeing, social or financial position, relationship between parties, distress, annoyance or embarrassment suffered
- $20,000 benchmark
- Aggravated and punitive damages possible, but rare
- Note: Superior Court judges have power to order costs. Usually go to the successful party. "Costs follow the cause."

Could mistake be a defense to invasion of privacy? Traditional view is NO - if you intended to access the records, it does not matter if you did so by mistake.

Jones v Tsige is not yet binding law in Alberta - although there is much favourable judicial and academic consideration

RJ Hoffman Holdings Ltd (Alberta Privacy Commissioner)

- No one was watching security camera videos contemporaneously, but can review the tape within 30 days, when the video is deleted
- An employee filed a complaint with the Privacy Commissioner that their personal information is being improperly collected via the security cameras

1. Does PIPA apply? If so, what is the rationale for collecting the personal information?
    - **Is video surveillance the disclosure of personal information? PIPA creates a subset of the definition of "personal information" called "personal employee information"**
        - **Personal employee information covers information about an employee or potential employee that is reasonably required to be collected, used or disclosed for the purpose of establishing, maintaining or terminating the employment relationship**
        - **Employees include volunteers**
        - ***This includes the employee's image and identity, so video footage falls under this definition***
    - **The employer indicated that the videos were required for workplace safety, loss prevention and to monitor performance**

- **PIPA indicates that employers cannot collect or use personal information unless it is reasonable for the purposes for which the information is collected or disclosed**
    - **Privacy Commissioner came up with some principals**
        - **Employees have not surrendered all privacy rights merely by being on the premises of the employer**
        - **That being said, management does have some rights and power to manage premises**
        - **Society is moving towards increased protection of privacy**
        - **The employer must demonstrate that the intrusion of privacy is necessary and reasonable**

2. Was the intrusion into privacy reasonable in the circumstances?
- What are the reasons given by the employer for conducting the surveillance?
    - See above
- Is the surveillance likely to be affected in addressing the issues identified by the employer?
    - Employer showed that there had been theft of company equipment and other employees' items, so surveillance was necessary
    - Also history of damage to equipment in the shop, the surveillance is necessary to show who actually caused the damage
    - This is a legitimate concern that is adequately remedied by the surveillance
    - For performance management issue, there was no evidence raised that showed performance management was a big issue
- Was the surveillance conducted in a reasonable manner?
    - The surveillance was effective, theft and damage to equipment virtually ceased
    - The cameras were all visible and clearly marked, they were not hidden
    - There were no cameras in restrooms or lunchrooms, where there were no safety concerns, and heightened privacy concerns
    - The tapes were only accessible to one manager who only reviewed the footage if it was necessary to do so (not a Big Brother situation)
    - For performance management, it is unclear as to whether surveillance is necessary. Privacy Commissioner rules that it is not reasonable to collect information from video surveillance for performance management reasons.
        - Therefore cannot look at video surveillance for performance management reasons

3. Was prior disclosure required?
- **Even where there is no consent required, the statute does require employers to give prior notice that surveillance is happening**
- **The employer HAD provided notification to employees that video cameras were being installed, but did not indicate why this was happening**
- **Therefore, Privacy Commissioner ordered that this information be provided to employees as a condition of continuing the surveillance**

Medical Information

- Employers may request medical information to verify the legitimacy of an absence from work, and to verify if measures are required to accommodate an employee suffering from medical illness
    - IT is legitimate to ask for the expected return to work date, and the amount of medical information that is required to be disclosed to the employer will change depending on the length of the absence
        - 1-3- day absence is NOT sufficient to require a doctor's note
    - For medical accommodations, need to know whether the illness is permanent or temporary, what the restrictions and limitations are, and whether the treatment or medication will affect the employee's ability to do the job in a safe manner
        - NOT entitled to know the actual diagnosis, or what the actual condition is
        - i.e. it is OK to describe it as an "abdominal problem" instead of "appendicitis"
        - Alberta HRC has sample forms that doctors can use to provide this information to employers
    - Employers can refer employees to company doctors only in rare and extreme circumstances

Re Misuse of Alberta Health Information (Netcare) (Alberta Privacy Commissioner)

Facts

- Doctor snooped on medical information of a person who was involved in a marital dispute with a friend of theirs, and fed this information to the friend who in turn provided it to their divorce lawyer
- Did this by searching the Netcare filing system (which aggregates all medical information collected on individuals in the province)
- The doctor was able to "piggy back" on a colleague's login to conceal the fact that it was him who was accessing the records
- The complainants found out about this because the divorce lawyer started asking strange questions about their medical history.

Decision

- Under the Health Information Act, the hospital has responsibility to ensure that records stored in Netcare are not wrongfully accessed
- The commissioner suggested that key fobs be introduced to ensure that the person who is using the station is the person who is logged in
    - Would also help to prevent unauthorized personnel from accessing Netcare
- The Commissioner did not proceed against the doctor because the doctor entered into an agreement to explain how he abused the system in exchange for not being tried himself for his misdeeds
- **This case shows that employers have a responsibility to ensure that adequate safeguards are in place to protect personal information**